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REPORTS OF THE SUPREME COURT

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CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1876.

REPORTED BY

WILLIAM T. OTTO.

VOL. III.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. MORRISON R. WAITE.

ASSOCIATES.

HON. NATHAN CLIFFORD.	HON. NOAH H. SWAYNE.
HON. SAMUEL F. MILLER.	HON. DAVID DAVIS.
HON. STEPHEN J. FIELD.	HON. WILLIAM STRONG.
HON. JOSEPH P. BRADLEY.	HON. WARD HUNT.

ATTORNEY-GENERAL.

HON. ALPHONSO TAFT.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 1, 1874, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUSTICE, AND STATE FROM WHENCE APPOINTED.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE OF COMMISSION, AND BY WHOM APPOINTED.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, N. CAROLINA, AND S. CAROLINA.	Jan. 21. PRESIDENT GRANT.
ASSOCIATES.	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	Jan. 12. PRESIDENT BUCHANAN.
	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	Dec. 11. PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	Feb. 18. PRESIDENT GRANT.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21. PRESIDENT GRANT.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, & TENNESSEE.	Jan. 24. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	Dec. 8. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, & NEBRASKA.	July 16. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10. PRESIDENT LINCOLN.

AMENDMENTS TO GENERAL RULES.

Amendment to Section 4, Rule 10.

"In each case fees shall be charged in the taxable costs for but one manuscript copy of the record, and that shall be to the party bringing the cause into court, unless the court shall otherwise direct."

[Promulgated Nov. 27, 1876.]

Amendment to Rule 6.

Add at the end of section 1:—

"One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins."

[Promulgated Dec. 18, 1876.]

AMENDMENT TO GENERAL ORDERS IN BANKRUPTCY.

Amendment to General Order 30, of the General Orders in Bankruptcy, entitled "Fees and Costs," under the head of "Assignees."

"It being found that, in certain special cases requiring great care and exertion on the part of assignees in bankruptcy, the fees and allowances now provided are insufficient, it is therefore hereby

"*Ordered*, That, in such cases as are above mentioned, the district judge be, and is hereby, authorized, by and with the advice and concurrence of the circuit justice or judge, to make such additional allowance to the assignee or trustee, or to both or either of them if there be more than one, as in his judgment shall be a fair and just compensation for his or their services, having regard to the amount of assets, the amount of labor required, and the special circumstances of the case; and that so much of General Order 30 as conflicts herewith be repealed."

[Promulgated March 17, 1877.]

TABLE OF CASES.

Page

Abraham et al., Terry *v.* 38
Adams Express Company, Bank of Kentucky *v.* 174
Adams Express Company, Planters' National Bank of Louisville *v.* 174
Alling, Administrator, Sherlock et al. *v.* 99
American Emigrant Company, County of Calhoun et al. *v.* . 124
Arthur, Collector, DeBary *v.* 420
Atchison, Topeka, and Santa Fé Railroad Company *v.* United States 442
"Atlas," The 302
Augusta, City Council of, Home Insurance Company *v.* . . 116

Badger et al. *v.* United States *ex rel.* Bolles 599
Baltimore Warehouse Company, Home Insurance Company *v.* 527
Bank of Kentucky *v.* Adams Express Company 174
Barkley *v.* Levee Commissioners et al. 258
Bayne et al., Trustees, *v.* United States 642
Beaver *v.* Taylor et al. 46
Berkshire Life Insurance Company, Bigelow *v.* 284
Bigelow *v.* Berkshire Life Insurance Company 284
Bird et al., Executors, *v.* Louisiana State Bank 96
Birdsall et al. *v.* Coolidge 64
Board of Commissioners of Tippecanoe County *v.* Lucas, Treasurer 108
Board of Supervisors of Trempealeau County, West Wisconsin Railway Company *v.* 595
Board of Supervisors of Wood County *v.* Lackawana Coal and Iron Company 619
Bolles, United States *ex rel.*, Badger et al. *v.* 599
Bond et al. *v.* Moore 593
Brant *v.* Virginia Coal and Iron Company et al. 326
Broughton *v.* Pensacola 266

Page
Buck, Executor, Manhattan Life Insurance Company *v.* . . 24
Buick, Sherman *v.* 209

Calhoun, County of, et al. *v.* American Emigrant Company . 124
Callanan *v.* Hurley 387
Callaway, County of, *v.* Foster 567
Campbell et al., Assignees, Wiswall et al. *v.* 347
Carter et al., Ryan et al. *v.* 78
Central Railroad Company of Iowa et al., Sage et al. *v.* . . 412
Chapman, Executor, Smith, Executor, *v.* 41
Chemung Canal Bank *v.* Lowery 72
City Council of Augusta, Home Insurance Company *v.* . . . 116
City of Winona *v.* Cowdrey 612
Claflin *v.* Houseman, Assignee 130
Claflin et al., Fuller et al. *v.* 14
Cockle et al. *v.* Flack et al. 344
Cofield et al., Tilton et al. *v.* 163
Cohn *v.* United States Corset Company 366
Coolidge, Birdsall et al. *v.* 64
County of Calhoun et al. *v.* American Emigrant Company . 124
County of Callaway *v.* Foster 567
County of Randolph *v.* Post 502
Cowdrey, City of Winona *v.* 612
Cowdrey et al. *v.* Galveston, Houston, and Henderson Railroad Company et al. 352

Dalton *v.* Jennings 271
Daney Gold and Silver Mining Company, Heydenfeldt *v.* . . 634
DeBary *v.* Arthur, Collector 420
Desmare *v.* United States 605
Ditto et al., Kibbe *v.* 674
Dodge, Russell *v.* 460
Dodge et al. *v.* Freedman's Savings and Trust Company . . 379
Donaldson, Assignee, *v.* Farwell et al. 631
Doyle et al., Huff *v.* 558
Dresser *v.* Missouri and Iowa Railway Construction Company 92

Embrey, Administrator, Stanton et al. *v.* 548
Ex parte Henderson 405
Ex parte Karstendick 396
Ex parte Parks 18
Evans, Kimball *v.* 320

Page
Farwell et al., Donaldson, Assignee, *v.* 631
Ferrary et al., United States *v.* 625
Flack et al., Cockle et al. *v.* 344
Forty-three Gallons of Whiskey, &c., United States *v.* 188
Foster, County of Callaway *v.* 567
Freedman's Savings and Trust Company, Dodge et al. *v.* . . . 379
Freedman's Savings and Trust Company, Talty *v.* 321
French *v.* Fyan et al. 169
Fuller et al. *v.* Claflin et al. 14
Fyan et al., French *v.* 169

Gaines et al. *v.* Hale et al. 3
Gaines, Smith et al. *v.* 341
Gallagher, Ober *v.* 199
Galveston, Houston, and Henderson Railroad Company et al., Cowdrey et al. *v.* 352
Garfielde *v.* United States 242
Georgia et al., South Carolina *v.* 4
Goodyear Dental Vulcanite Company et al., Smith *v.* 486
Grant, Collector, *v.* Hartford and New Haven Railroad Company. 225
Gregory *v.* McVeigh. 284
Grymes *v.* Sanders et al. 55

Hale et al., Gaines et al. *v.* 3
Harrison et al., Yznaga Del Valle *v.* 233
Hartford and New Haven Railroad Company, Grant, Collector, *v.* 225
Hartford Fire Insurance Company, Schacker *v.* 241
"Hasbrouck, John L.," The 405
Hatch, Terry *v.* 44
Hazard Powder Company, Martin *v.* 302
Henderson, *Ex parte* 405
Hendrick *v.* Lindsay et al. 143
Henning et al., Hornor *v.* 228
Hervey et al. *v.* Rhode Island Locomotive Works 664
Heydenfeldt *v.* Daney Gold and Silver Mining Company . . 634
Hoge, Comptroller-General, et al., *v.* Richmond and Danville Railroad Company 1
Home Insurance Company *v.* Baltimore Warehouse Company 527
Home Insurance Company *v.* City Council of Augusta . . . 116
Hornor *v.* Henning et al. 228

Page
Horst, Indianapolis and St. Louis Railroad Company *v.* . . 291
Houseman, Assignee, Claflin *v.* 130
Huff *v.* Doyle et al. 558
Hurley, Callanan *v.* 387
Hurst *v.* Western and Atlantic Railroad Company 71

"Idaho," The 575
Indianapolis and St. Louis Railroad Company *v.* Horst. . . 291
Indianapolis, Bloomington, and Western Railway Company *v.* Rhode Island Locomotive Works 674

Jennings, Dalton *v.* 271
"John L. Hasbrouck," The 405
Jones *v.* Pensacola 271
"Juniata," The 337

Karstendick, *Ex parte* 396
Kenny, Sawin, Administrator, *v.* 289
Kentucky, Bank of, *v.* Adams Express Company 174
Kerrison, Assignee, *v.* Stewart et al. 155
Kibbe *v.* Ditto et al. 674
Kimball *v.* Evans. 320
Kitchen *v.* Randolph 86

Lackawana Coal and Iron Company, Board of Supervisors of Wood County *v.* 619
Lake Superior and Mississippi Railroad Company *v.* United States 442
Levee Commissioners et al., Barkley *v.* 258
Lindsay et al., Hendrick *v.* 143
Louisiana, Morgan *v.* 217
Louisiana State Bank, Bird et al., Executors, *v.* 96
Lovejoy *v.* Spafford et al. 430
Lowery, Chemung Canal Bank *v.* 72
Lucas, Treasurer, Board of Commissioners of Tippecanoe County *v.* 108
Luning, White et al. *v.* 514

MacConnell et al., Assignees, O'Hara et al. *v.* 150
Mackie et al. *v.* Story 589
Manhattan Life Insurance Company *v.* Buck, Executor. . . 24
Martin *v.* Hazard Powder Company 302

Page
McVeigh, Gregory *v.* 284
McVeigh, Windsor *v.* 274
Missouri and Iowa Railway Construction Company, Dresser *v.* 92
Moore, Bond et al. *v.* 593
Morgan *v.* Louisiana 217
Mutual Life Insurance Company *v.* Snyder 393

New York Life Insurance Company *v.* Seyms 24
New York Life Insurance Company *v.* Statham et al. . . . 24
Norton, Assignee, *v.* Switzer 355

Ober *v.* Gallagher 199
O'Hara et al. *v.* MacConnell et al., Assignees 150
Osterberg *v.* Union Trust Company 424

Parks, *Ex parte* 18
Pensacola, Broughton *v.* 266
Pensacola, Jones *v.* 271
People, &c., in Utah, Wiggins *v.* 465
Planters' National Bank of Louisville *v.* Adams Express Company 174
Post, County of Randolph *v.* 502

Randolph, County of, *v.* Post 502
Randolph, Kitchen *v.* 86
Rhode Island Locomotive Works, Hervey et al. *v.* 664
Rhode Island Locomotive Works, Indianapolis, Bloomington, and Western Railway Company *v.* 674
Richmond and Danville Railroad Company, Hoge, Comptroller-General, et al., *v.* 1
Rogers, Western Union Telegraph Company *v.* 565
Russell *v.* Dodge 460
Ryan et al. *v.* Carter et al. 78

Sage et al. *v.* Central Railroad Company of Iowa et al. . . 412
Sanders et al., Grymes *v.* 55
Sawin, Administrator, *v.* Kenny 289
Schacker *v.* Hartford Fire Insurance Company 241
Seyms, New York Life Insurance Company *v.* 24
Shaw *v.* United States 235
Sherlock et al. *v.* Alling, Administrator 99
Sherman *v.* Buick 209

Page
Smith *v.* Goodyear Dental Vulcanite Company et al. . . . 486
Smith, Executor, *v.* Chapman, Executor 41
Smith et al. *v.* Gaines 341
Snyder, Mutual Life Insurance Company *v.* 393
South Carolina *v.* Georgia et al. 4
Spafford et al., Lovejoy *v.* 430
Stanton et al. *v.* Embrey, Administrator 548
Statham et al., New York Life Insurance Company *v.* . . . 24
Stewart et al., Kerrison, Assignee, *v.* 155
Story, Mackie et al. *v.* 589
Switzer, Norton, Assignee, *v.* 355

Talty *v.* Freedman's Savings and Trust Company 321
Tameling *v.* United States Freehold and Emigration Company 644
Taylor et al., Beaver *v.* 46
Terry *v.* Abraham et al. 38
Terry *v.* Hatch 44
The "Atlas" 302
The "Idaho" 575
The "John L. Hasbrouck" 405
The "Juniata" 337
Thompson et al., United States *v.* 586
Tilton et al. *v.* Cofield et al. 163
Tippecanoe County, Board of Commissioners of, *v.* Lucas, Treasurer 108
Trempealeau County, Board of Supervisors of, West Wisconsin Railway Company *v.* 595

Union Trust Company, Osterberg *v.* 424
United States, Atchison, Topeka, and Santa Fé Railroad Company *v.* 442
Bayne et al., Trustees, *v.* 642
Desmare *v.* 605
Ferrary et al. *v.* 625
v. Forty-three Gallons of Whiskey, &c. . . . 188
Garfielde *v.* 242
Lake Superior and Mississippi Railroad Company *v.* 442
Shaw *v.* 235
v. Thompson et al. 586
Whiteside et al. *v.* 247

Page
United States *ex rel.* Bolles, Badger et al. *v.* 599
United States Corset Company, Cohn *v.* 366
United States Freehold and Emigration Company, Tameling *v.* 644
Utah, People, &c., in, Wiggins *v.* 465

Virginia Coal and Iron Company et al., Brant *v.* 326

West Wisconsin Railway Company *v.* Board of Supervisors of Trempealeau County 595
Western and Atlantic Railroad Company, Hurst *v.* 71
Western Union Telegraph Company *v.* Rogers 565
White et al. *v.* Luning 514
Whiteside et al. *v.* United States 247
Wiggins *v.* People, &c., in Utah 465
Windsor *v.* McVeigh 274
Winona, City of, *v.* Cowdrey 612
Wiswall et al. *v.* Campbell et al., Assignees 347
Wood County, Board of Supervisors of, *v.* Lackawana Coal and Iron Company 619

Yznaga Del Valle *v.* Harrison et al. 233

REPORTS OF THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1876.

HOGE, COMPTROLLER-GENERAL, ET AL., *v.* RICHMOND AND DANVILLE RAILROAD COMPANY.

The court will not, in preference to cases pending between private parties, set down for argument a case in which the execution of the revenue laws of a State has been enjoined, unless it sufficiently appears that the operations of the government of the State will be embarrassed by delay.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The Richmond and Danville Railroad Company, a stockholder in the Atlanta and Richmond Air-Line Railroad Company, obtained a decree in the Circuit Court enjoining the taxing officers of South Carolina from levying and collecting, and the last-named company from paying, any State, county, or municipal taxes upon its property within that State, upon the ground that by its charter it was exempt from such taxation. This appeal was taken from that decree.

Mr. William Stone, Attorney-General of the State of South Carolina, moved that this cause be advanced on the docket.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This motion is based upon sect. 949 of the Revised Statutes, which is as follows: —

"When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in a court of the United States, such State, or the party claiming under the revenue laws of a State the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

The original act, to which this section of the revision is applicable, was passed June 30, 1870 (16 Stat. 176). Until that time, the order of hearing causes in this court was regulated almost entirely by rule; and we then held that the only cases of general public interest which should be taken up out of their regular order were those in which the question in dispute would embarrass the operations of the government while it remained unsettled. *United States* v. *Fossatt*, 21 How. 445. The statute is not imperative. It does not provide that all cases in which the execution of the revenue laws of the State is enjoined or stayed shall have preference over others upon the docket, but only such as, upon a showing, the court is of the opinion should be heard out of their order. The court must determine what is "sufficient reason" for this preference, under all the circumstances of the case.

In the present crowded state of our docket, it is incumbent on us to take care that injustice is not done to "private parties" by the unnecessary advancement of causes affecting public interests. To that end we now hold, that we will not give preference to cases in which the execution of the revenue laws of a State is enjoined, unless it sufficiently appears that the operations of the government of the State will be embarrassed by delay.

The Illinois Railroad Tax Cases, heard out of their order at the last term, may be referred to for the purpose of illustration. There the question was as to the constitutionality of the law under which all the property of railroad corporations in that State was taxed. The courts of the State had decided in favor of the validity of the law, and the Circuit Court of the United States against it. They were class cases; and their determination would dispose of many other suits of the same character then pending in the Circuit Court in which inter-

locutory injunctions had been allowed. In addition to this, it was shown that the action of the Circuit Court, in granting such injunctions, practically suspended not only "the enforcement of the revenue laws of Illinois against railroad corporations, but the collection of the taxes assessed upon the capital stock and franchises of all other corporations in the State, except so far as such corporations voluntarily pay such taxes." Under such circumstances, it is easy to see that questions of great public interest were involved, and that the operations of the government of the State would be embarrassed, so long as they remained undetermined by this court. Sufficient reason was shown, and the causes were accordingly advanced.

But here no such circumstances exist. The injunction operates only upon the property of a single corporation. The value of the property, or the amount of the revenue to be derived from it, is not shown. No question affecting the power of the State to tax other property is involved. The only dispute is as to the liability of the property of this single owner to taxation. The actual amount in controversy may be, and probably is, much less than that in very many other cases waiting their turn to be heard in the regular call of our docket. No disputed principle of law affecting any other case is, so far as we can discover from the record, presented for our determination.

We are of opinion, therefore, that a proper showing has not been made; but, as we have not before announced in so formal a manner the rule of practice which we have established for our government under this statute, leave is granted to the appellant to renew the motion if the defects which now exist in the showing can be supplied. *Motion denied.*

GAINES ET AL. v. HALE ET AL.

Where, in a suit between some of the claimants to the hot springs in Arkansas, the Supreme Court of that State by its decree refused aid to any of them against the other, except as to the improvements erected by each respectively on the property, and as to them saved the rights of the United States, this court, having decided in *Hot Springs Cases*, 92 U. S. 698, that the United States is the owner of the property, affirms that decree.

ERROR to the Supreme Court of the State of Arkansas.

Submitted on printed arguments by *Mr. W. M. Rose* for the plaintiffs in error, and by *Mr. Albert Pike*, *Mr. R. W. Johnson*, *Mr. J. B. Sanborn*, and *Mr. Frederick P. Stanton*, for the defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The decision made by this court in *Hot Springs Cases* at the last term, 92 U. S. 698, has disposed of the principal controversy between the parties in this case, by declaring that neither of them is entitled to the land in question, and that the same belongs to the United States. As the decree of the Supreme Court of Arkansas, in the present case, does not contravene this decision, but refuses aid to any of the parties against each other, except as to the improvements erected by each respectively, and as to these, saves the rights of the United States, we do not perceive any error in said decree on any Federal question. *Decree affirmed.*

SOUTH CAROLINA v. GEORGIA ET AL.

1. The compact between South Carolina and Georgia, made in 1787, by which it was agreed that the boundary between the two States should be the northern branch or stream of the Savannah River, and that the navigation of the river along a specified channel should for ever be equally free to the citizens of both States, and exempt from hinderance, interruption, or molestation, attempted to be enforced by one State on the citizens of the other, has no effect upon the subsequent constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several States.
2. Congress has the same power over the Savannah River that it has over the other navigable waters of the United States.
3. The right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve navigable rivers and ports on such rivers.
4. Congress has power to close one of several channels in a navigable stream, if, in its judgment, the navigation of the river will be thereby improved. It may declare that an actual obstruction is not, in the view of the law, an illegal one.
5. An appropriation for the improvement of a harbor on a navigable river, "to be expended under the direction of the Secretary of War," confers upon that officer the discretion to determine the mode of improvement, and

authorizes the diversion of the water from one channel into another, if in his judgment such is the best mode. By such diversion preference is not given to the ports of one State over those of another. *Quære*, Whether a State suing for the prevention of a nuisance in a navigable river, which is one of its boundaries, must not aver and show that she sustains some special and peculiar injury thereby, such as would enable a private person to maintain a similar action.

THIS is a bill in equity, filed in this court by the State of South Carolina, praying for an injunction restraining the State of Georgia, Alonzo Taft (Secretary of War), A. A. Humphries (chief of the corps of engineers United States army), Q. A. Gilmore (lieutenant-colonel of that corps), and their agents and subordinates, from "obstructing or interrupting" the navigation of the Savannah River, in violation of the compact entered into between the States of South Carolina and Georgia on the twenty-fourth day of April, 1787. The first and second articles of that compact are as follows: —

"ARTICLE 1. The most northern branch or stream of the river Savannah, from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence, the most northern branch or stream of the said river Tugoloo, till it intersects the northern boundary-line of South Carolina, if the said branch or stream extends so far north, reserving all the islands in the said rivers Tugoloo and Savannah to Georgia; but if the head spring or source of any branch or stream of the said river Tugoloo does not extend to the north boundary-line of South Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo River which extends to the highest northern latitude, shall, for ever hereafter, form the separation, limit, and boundary between the States of South Carolina and Georgia.

"ART. 2. The navigation of the river Savannah, at and from the bar and mouth, along the north-east side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of the said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the channel of the most northern stream of Tugoloo River to its source, and back again by the same channel to the Atlantic Ocean, is hereby declared to be henceforth equally free to the citizens of

both States, and exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia."

Congress enacted June 23, 1874: "That the following sums of money be, and are hereby, appropriated to be paid out of any money in the treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, for the repair, preservation, and completion of the following public works hereinafter named."

"For continuing the improvement of the harbor at Savannah, $50,000." 18 Stat. 240.

The act of March 3, 1875 (18 id. 459), contains the following appropriation: "For the improvement of the harbor at Savannah, Ga., $70,000."

The work which the bill seeks to arrest is doing pursuant to the authority conferred by these acts.

The Savannah River, where it flows past the city of Savannah, is divided into two channels by Hutchinson's Island, which extends above and below the city, with a length of about six miles, and a width, where widest, of one mile or more. Of these channels, the more northerly is known as Back River, whilst that which passes immediately by the city of Savannah is called Front River.

The improvement consists in the construction of a crib dam at a point known as the "Cross Tides," for the purpose, by diverting a sufficient quantity of the water passing through the Back River into the Front River channel, of securing to the city a depth of fifteen feet at low water.

Mr. William Henry Trescot and *Mr. Philip Phillips* for the complainant.

1. The terms of the treaty of Beaufort are perpetual. Biordan & Duane, U. S. Laws, vol. i.; 1 Stat. So. Ca.; Wheaton's Int. Law, pt. 2, c. 2, sect. 268; Heffter, Droit Int., 170; *Chirac* v. *Chirac*, 2 Wheat. 259; Chappell's Historical Mis. of Georgia, pt. 2, 65; Bancroft, vol. viii. 137; vol. ix. 257; Articles of Confederation, Amer. Archives, vol. iv. 352–359.

2. Georgia and South Carolina were competent to execute

that treaty. Articles of Confederation; *Harcourt* v. *Gaillard*, 12 Wheat. 523; *Spooner* v. *McConnell*, 1 McLean, 347; Journal American Congress, vol. iv.; 2 Stat. 57.

3. The adoption of the Federal Constitution did not abrogate the treaty. Constitution of United States; *Spooner* v. *McConnell*, *supra;* Ordinance of 1787; *Wilson* v. *Blackbird Creek Co.*, 3 Pet. 245; *Hogg* v. *Zanesville Manuf. Co.*, 5 Ohio, 410; *Woodbourn* v. *Kilbourn Manuf. Co.*, 1 Abb. 158; *Pollard* v. *Hogan's Lessee*, 3 How. 212; *Permolli* v. *First Municipality*, id. 589; *Strader* v. *Graham*, 10 id. 82; *Dred Scott*, 19 id. 396; *Howard* v. *Ingersoll*, 13 id. 405; American State Papers, Public Lands, vol. i. 103; President's Message, 1835, Dec. 8, Senate Doc. 1, p. 108; Engineer Report, 1838, MSS.; President's Message, February, 1840, Doc. 2; id. July, 1850, Ex. Doc. 19; Appropriation Acts, 1828–73; Annual Report, Gen. Gilmore, 1873, pp. 16, 17; *Gilman* v. *Philadelphia*, 3 Wall. 928; *Fowler* v. *Lindsey*, 3 Dall. 411.

4. The acts of Congress should be so construed and executed as not to invade the rights of the State under the compact (*Aldridge* v. *Williams*, 3 How. 24; *Savings-Bank* v. *United States*, 19 Wall. 237; *Fisher* v. *United States*, 2 Cranch, 385; *United States* v. *Kirby*, 7 Wall. 486; *Dash* v. *Vankleek*, 7 Johns. 502; *Cohens* v. *Virginia*, 6 Wheat. 264; *Comm.* v. *Dounes*, 24 Pick. 230), or to give preference to the ports of one State over those of another.

5. The State is the proper party complainant. *Georgetown* v. *Canal Co.*, 12 Pet. 91; *Cohens* v. *Virginia*, 6 Wheat. 264; *Georgia* v. *Stanton*, 6 Wall. 75.

6. The equity side of the court is properly invoked. *Wheeling Bridge Case*, 13 How. 560; *Georgetown* v. *Canal Co.*, *supra.*

7. The court will not enter into the question as to the degree of the obstruction. *Green* v. *Biddle*, 8 Wheat. 2; *King* v. *Ward*, 4 Ad. & El. 384.

Mr. Solicitor-General Phillips, contra.

1. South Carolina and Georgia, by becoming members of the Union, stripped themselves of all power under the second article of their agreement of 1787, when the United States undertook to regulate the navigation of the river. Both States

were, thereafter, excluded from interference with it. *Cooley* v. *Board of Wardens of Port of Philadelphia et al.*, 12 How. 299; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crandall* v. *State of Nevada*, 9 id. 35.

2. That agreement confers no present rights upon citizens of South Carolina to navigate the Savannah. Their rights, in common with those of all citizens of the United States, are perfect under the Constitution, and cannot be vindicated by a suit in the name of the State.

3. When a State brings suit in a court of the United States, it appears in its private capacity, is treated as other litigants, and must make out such a cause of action as would entitle them, under the same circumstances, to recover. *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 18 How. 518; *City of Georgetown* v. *The Alexandria Canal Co.*, 12 Pet. 91. The property rights of South Carolina are not involved, and there is no pretence of any apprehended damage to them by reason of this pretended obstruction. The only ground of complaint is, that the interests of her citizens may be thereby injuriously affected.

4. The navigation of the Savannah River will not be obstructed by the contemplated mode of improvement. The plan therefor adopted after thorough examination by experienced and skilful engineers, and approved by the appropriate committees of the two houses, received the ultimate sanction of Congress. That body has the unquestionable power to improve the navigable waters of the United States, and is the exclusive judge of the most expedient mode of exercising it. Full discretion in the expenditure of the sum appropriated has been confided to the Secretary of War, who will carry out that plan. It is an idle pretence, that, by so doing, preference will be given to the ports of one State over those of another.

MR. JUSTICE STRONG delivered the opinion of the court.

We do not perceive that, in this suit, the State of South Carolina stands in any better position than that which she would occupy if the compact of 1787 between herself and Georgia had never been made. That compact defined the boundary between the two States as the most northern branch

or stream of the river Savannah from the sea, or mouth of the stream, to the fork or confluence of the rivers then called Tugoloo and Keowee. The second article declared that the navigation of the river Savannah, at and from the bar and mouth, along the north-east side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of said island, and from thence up the bed or principal stream of the said river to the confluence of the rivers Tugoloo and Keowee, . . . should thenceforth be equally free to the citizens of both States, and exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever, attempted to be enforced by one State on the citizens of the other. Undoubtedly this assured to the citizens of the two States the free and unobstructed navigation of the channel described, precisely the same right which they would have possessed had the original charters of the two provinces, Georgia and South Carolina, fixed the Savannah River as the boundary between them. It needed no compact to give to the citizens of adjoining States a right to the free and unobstructed navigation of a navigable river which was the boundary between them. But it matters not to this case how the right was acquired, whether under the compact or not, or what the extent of the right of South Carolina was in 1787. After the treaty between the two States was made, both the parties to it became members of the United States. Both adopted the Federal Constitution, and thereby joined in delegating to the general government the right to "regulate commerce with foreign nations, and among the several States." Whatever, therefore, may have been their rights in the navigation of the Savannah River before they entered the Union, either as between themselves or against others, they both agreed that Congress might thereafter do every thing which is within the power thus delegated. That the power to regulate inter-State commerce, and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States, — rivers that are accessible from other States, at least to the extent of improving their navigability, — has not been questioned during the argument, nor could it be with any show of

reason. From an early period in the history of the government, it has been so understood and determined. Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to "regulate commerce," conferred by the Constitution upon Congress, is that which previously existed in the States. As was said in *Gilman* v. *Philadelphia*, 3 Wall. 724, "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce.

But it is insisted on behalf of the complainant, that, though Congress may have the power to remove obstructions in the navigable waters of the United States, it has no right to

authorize placing obstructions therein; that while it may improve navigation, it may not impede or destroy it. Were this conceded, it could not affect our judgment of the present case. The record exhibits that immediately above the city of Savannah the river is divided by Hutchinson's Island, and that there is a natural channel on each side of the island, both uniting at the head. The obstruction complained of is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern, by increasing the flow of the water through the former, thus increasing its depth and water-way, as also the scouring effects of the current. The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the water-way of one of its channels, and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient, — a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand-bank, or a jetty pushed out into the stream to narrow the water-way, and increase the depth of water and the direction and the force of the current, or the pier of a bridge standing where vessels now pass, and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense, obstructions to navigation; but, so far as they tend to facilitate commerce, it is not claimed that they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet all, except the pier, are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build

light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over inter-State and foreign commerce is concerned, this is not to be doubted. Might not the States of South Carolina and Georgia, by mutual agreement, have constructed a dam across the cross-tides between Hutchinson and Argyle Islands, and thus have confined the navigation of the Savannah River to the southern channel? Might they not have done this before they surrendered to the Federal government a portion of their sovereignty? Might they not have constructed jetties, or manipulated the river, so that commerce could have been carried on exclusively through the southern channel, on the south side of Hutchinson's Island? It is not thought that these questions can be answered in the negative. Then why may not Congress, succeeding, as it has done, to the authority of the States, do the same thing? Why may it not confine the navigation of the river to the channel south of Hutchinson's Island; and why is this not a regulation of commerce, if commerce includes navigation? We think it is such a regulation.

Upon this subject the case of *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 18 How. 421, is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation. It was, therefore, decided that an act of Congress declaring a bridge over the Ohio River, which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce.

It was further ruled that the act was not in conflict with the provision of the Constitution, which declares that no preference shall be given by any regulation of commerce or revenue

to the ports of one State over those of another. The judgment in that case is, also, a sufficient answer to the claim made by the present complainant, that closing the channel on the South Carolina side of Hutchinson's Island is a preference given to the ports of Georgia forbidden by this clause of the Constitution. It was there said that the prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce. "It will not do," said the court, "to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power." The case of *The Clinton Bridge*, 10 Wall. 454, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream.

The plaintiff next contends that if Congress has the power to authorize the construction of the work in contemplation and in progress, whereby the water will be diverted from the northern into the southern channel of the river, no such authority has been given. With this we cannot concur. By an act of Congress of June 23, 1874, an appropriation was made of $50,000, to be expended under the direction of the Secretary of War, for the repairs, preservation, and completion of certain public works, and, *inter alia*, "for the improvement of the harbor of Savannah." The act of March 3, 1875, made an additional appropriation of $70,000, "for the improvement of the harbor of Savannah, Georgia." It is true that neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War, and the mode adopted under his supervision plainly tends to the improvement contemplated. We know judicially the fact that the harbor is the river in front of the city, and the case, as exhibited by the pleadings, reveals that the acts of which the plaintiff complains tend directly to increase the volume of water in the channel opposite the city, as well as the width of the water-way. Without

relying at all upon the report of the engineers, which was before Congress, and which recommended precisely what was done, we can come to no other conclusion than that the defendants are acting within the authority of the statutes, and that the structure at the cross-tides intended to divert the water from the northern channel into the southern is, in the judgment of the law, no illegal obstruction. The plaintiff has, therefore, made no case sufficient to justify an injunction, even if the State is in a position to ask for it.

But, in resting our judgment upon this ground, we are not to be understood as admitting that a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court. Upon that subject we express no opinion. It is sufficient for the present case to hold, as we do, that the acts of the defendants, of which South Carolina complains, are not unlawful, and consequently that there is no nuisance against which an injunction should be granted.

The special injunction heretofore ordered is dissolved, and the *Bill dismissed.*

FULLER ET AL. v. CLAFLIN ET AL.

1. An order striking out an answer, as it ends the cause, leaves the action undefended, and confers a right to immediate judgment, is subject to review in the appellate court.
2. The court below having, on demurrer, held an answer to be sufficient, directed it to be made more specific and certain. The party thereupon filed an answer, which, although in substantial compliance with the order, was stricken out, and judgment rendered in favor of the plaintiff for the amount of the claim sued on. *Held*, that the action of the court in striking out the answer and proceeding to judgment was erroneous.

ERROR to the Circuit Court of the United States for the Western District of Arkansas.

Submitted on printed arguments by *Mr. Benjamin T. Duval*

for the plaintiffs in error, and by *Mr. Isaac Dayton* for the defendants in error.

MR. JUSTICE HUNT delivered the opinion of the court.

This action was brought to recover the amount of two promissory notes of $1,000 each, given by the firm of Fuller & McKibben to H. B. Claflin & Co., and dated July 1, 1870.

A defence was set up that the execution of the notes was procured by an agent of the holders, who presented the statement of an account showing a balance of $3,407.73; that, believing the statement to be accurate, the defendants gave the notes in suit and two others, in all equalling the amount claimed by the statement; that the statement was, in fact, false and fraudulent; that due on the account there was less than $1,550, which has since been paid to Claflin & Co.

To this answer a demurrer was interposed and overruled.

A motion was then made, and granted, that the answer be rendered more specific by setting forth the statement therein referred to, and the items and particulars of the alleged falsity. In obedience to this order a further answer was filed.

A motion was then made to strike out the further answer as not being a compliance with the order, and for judgment. The motion was granted, a request for time until the next morning to perfect the answer was refused, and judgment entered for the amount of the notes. From this judgment the present writ of error is brought.

It is objected, preliminarily, that the order directing the answer to be made more specific is one depending upon the discretion of the court, and that it is not appealable. It is said that the refusal of the court to grant further time to perfect the answer is also a discretionary order, and not appealable. This may be true. There is undoubtedly a large class of cases involving the procedure merely in a cause, in which the court acts as in its discretion it thinks best, and where no appeal can be taken from its decision.

It is quite likely that an order to make the answer more specific falls within this category. So it may well be conceded that the refusal to give further time until the next morning, to comply with the direction, comes within the same rule. It

may appear harsh to us, but the judge holding the circuit was better able, knowing all the circumstances, to determine the point than are we, at a distant time and place.

The rule we are speaking of has sometimes been held to apply to an order refusing to strike out an answer. 4 How. Pr. 432. But it does not apply to an order which strikes out an answer. That is not a mere procedure in the cause. It is the ending of the cause, leaving the action undefended and with a right to immediate judgment. Accordingly, we find in this case, that the same order entered on the 8th of December, 1873, at nine o'clock in the morning, which directed the amended answer to be struck out and denied permission to file a further answer on the next morning, also contained a final judgment for the amount of the notes described, with interest and costs, and directed that execution issue therefor. Such an order has often been held to be appealable. *Mandebaum* v. *The People*, 8 Wall. 310; *Hozey* v. *Bachan*, 16 Pet. 215; *Trustees* v. *Forbes*, 8 How. 285; *Crucible Co.* v. *Steel Works*, 9 Abb. Pr. N. S. 195; *Union Bank* v. *Mott*, 11 Abb. Pr. 42; *Shelden* v. *Adams*, 18 id. 405.

The question then recurs upon the merits of the order striking out the answer, on the ground that it was not in compliance with the rule requiring certain particulars to be stated. The first answer alleged that the statement furnished by the agent of Claflin & Co. was false, and that instead of there being a balance of $3,400 then due from the debtors, as in the statement set forth, there was due less than $1,550. The court ordered that this answer should be made more definite and precise, in two particulars: 1st, that the statement referred to should be set forth in the answer; and, 2d, that the particulars and items of alleged fraud or error should be stated with certainty and precision.

The first direction was performed by the allegation of the answer that "the original of said statement had been lost or destroyed, but a copy of which, except the credits dated on said copy on and after July 1, 1870, is filed with the deposition of Lyman Mallory, marked exhibit B, of depositions in said cause." A copy of a lost document is attached to the deposition of Mallory, the agent who made the statement, and who

appears to have been examined upon deposition, and, as we may presume, on behalf of his employers. This is a reasonable compliance with the direction. It is an allegation that the creditors themselves are in possession of and have filed a copy of the statement, that the debtors admit the accuracy of the copy filed by their adversaries, that the original is lost or destroyed, and that it is out of their power to produce it.

The second requisition is also fairly complied with; to wit, that a specification of the alleged items of error shall be made. Thus, it was alleged in the second answer, that, instead of there being due to Claflin & Co. the sum of $3,407, there was due less than $1,550; and the difference between these two sums, and in items which should have been credited in the statement, were set forth as follows: —

1. The sum of $801, the amount of a bill of goods lost in transit, which the plaintiffs recovered from the owners, but which they fraudulently included in the account against the defendants.

2. The sum of $162.25, the amount of a bill of balmorals, which was twice charged against the defendants.

3. That the plaintiffs fraudulently omitted to give a sufficient credit, by the sum of $602.79, for money received on account of the defendants for cotton sunk in the Arkansas River, from certain underwriters at New Orleans.

4. That there was a failure to credit the sum of $24.22, paid on the ninth day of April, 1868.

These four items aggregate the sum of more than $1,590, and, so far as they went, were specifications of the items set forth in the answer. We think there was no ground for the alleged failure to comply with the order of the court in respect to specifying the items.

It is further objected that the answer is not good in law, for that it does not show how the fraud was effected. The court below, upon demurrer, held the answer to be good. This decision stands unreversed, and is the law of this case. But we are not discussing that question. The point whether the answer contained a sufficient compliance with the previous order of the court, and whether, for the absence of such compliance, the court was justified in striking it out, is all that is before us.

We are of the opinion that there was error in the proceed-

ing below; that the order striking out the answer and the final judgment rendered should be reversed, and the case remanded to the Circuit Court for further proceedings.

It is so ordered.

EX PARTE PARKS.

1. Where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from this court, it will not on *habeas corpus* review the legality of the proceedings.
2. It is only where the proceedings below are entirely void, either for want of jurisdiction, or other cause, that such relief will be given.
3. Whether a matter for which a party is indicted in the District Court is, or is not, a crime against the laws of the United States, is a question within the jurisdiction of that court, which it must decide. Its decision will not be reviewed here by *habeas corpus*.
4. *Ex parte Yerger*, 8 Wall. 85, and *Ex parte Lange*, 18 id. 168, referred to and approved.

MR. WILLIAM GREEN presented the petition of Richard S. Parks praying for a writ of *habeas corpus*.

The petition is set forth, and the facts in the case are stated, in the opinion of the court.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The petitioner for *habeas corpus* in this case was convicted of forgery in the District Court of the United States for the Western District of Virginia, and is in custody by virtue of a commitment under sentence of imprisonment in the penitentiary for said offence. Complaining that his conviction was illegal, by reason that the act for which he was convicted was not a crime against the laws of the United States, he applied to the circuit judge for a *habeas corpus*, and, after a hearing thereon, was remanded into custody. Not being satisfied with this decision, he now applies to this court for a *habeas corpus*. His petition is as follows: —

"*To the Honorable Morrison R. Waite, Chief Justice, and his Associates, Justices of the Supreme Court of the United States:*

"The petition of Richard S. Parks respectfully represents, that your petitioner is illegally confined in jail, at Harrisonburg, in Vir-

ginia, being in the custody of A. S. Gray, as Marshal of the United States for the Western District of Virginia, by virtue of a commitment under an illegal sentence of the District Court of the United States for the said district, the same (sentence) being void and in law a nullity, for want of jurisdiction in the said court to pass it upon and against your petitioner, which said sentence was pronounced in a case of the United States against your petitioner, a transcript of the record whereof is herewith presented. That your petitioner heretofore made application to the honorable judge of Circuit Court of the United States for the said district, that he would order the discharge of your petitioner upon a writ of *habeas corpus* sued out for that object; but his honor, the said judge of the Circuit Court, instead of discharging, remanded him to the custody of the said marshal, as will appear from a transcript of his order in the said matter, which transcript is likewise herewith presented. And that your petitioner therefore prays at your honors' hands the benefit of the writ of *habeas corpus*, to be directed to the said marshal, commanding him to have before your honors, at a day and place to be named therein, the body of your petitioner, together with the cause of his capture and detention, to undergo and receive whatsoever your honors shall then and there consider of him in that behalf.

"And your petitioner will ever pray, &c.

"RICH'D S. PARKS."

The transcript of the record of conviction, which accompanies the petition, shows that the petitioner was indicted for forging the signature of C. Douglass Gray, register in bankruptcy, to the following receipt: —

"HARRISONBURG, July 30, 1872.

"Received of J. D. Martin, by R. S. Parks, his attorney, the application, with necessary papers, for adjudication in bankruptcy of said Martin; also, $50, amount of required deposit.

"C. DOUGLASS GRAY, *Register*."

One count of the indictment charges that Parks committed the forgery for the purpose of authenticating the commencement of proceedings in bankruptcy in the case of J. D. Martin. Another count alleges the purpose to have been to authenticate a proceeding in the said case; namely, the filing of the paper with the register. There was a third count, which did not state the purpose.

The petitioner contends that the forging of this receipt is not a crime by any act of Congress, and that, as the courts of the United States have no common-law jurisdiction of crimes, the District Court had no jurisdiction to try him for the offence. The indictment is founded on the forty-sixth section of the Bankrupt Act (re-enacted and made more general in sect. 5419 of the Revised Statutes), which declares, that "if any person shall forge the signature of a judge, register, or other officer of the court, or knowingly concur in using any such forged or counterfeited signature . . . for the purpose of authenticating any proceeding or document, . . . such person shall be guilty of felony," &c. The petitioner insists that the paper whose forgery is charged is not a document which could be used in evidence in any proceeding, by reason of its being authenticated by the official signature of the register. This proposition may be questioned. But suppose it were true, the receipt could be used in evidence, if genuine, for the purpose of showing the fact stated therein as against the signer in his official as well as private capacity. At all events, it is not clear and free from all doubt that the forgery is not within the terms of the statute.

But the question whether it was or was not a crime within the statute was one which the District Court was competent to decide. It was before the court, and within its jurisdiction. No other court, except the Circuit Court for the same district, having concurrent jurisdiction, was as competent to decide the question as the District Court.

Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, &c. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some Superior Court; and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus*, to review every case in which the defendant attempts to controvert the criminality of the offence charged in the indict-

ment. It having been held that the regulation of the appellate power of this court was conferred upon Congress, and Congress having given an appeal or writ of error in only certain specified cases, the implication is irresistible, that those errors and irregularities, which can only be reviewed by appeal or writ of error, cannot be reviewed in this court in any other cases than those in which those processes are given. Now, it has always been held that a mere error in point of law, committed by a court in a case properly subject to its cognizance, can only be reviewed by the ordinary methods of appeal or writ of error; but that where the proceedings are not only erroneous, but entirely void, — as where the court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence, — the Superior Court, or judge invested with the prerogative power of issuing a *habeas corpus*, may review the proceedings by that writ, and discharge from illegal imprisonment. This is one of the modes in which this court exercises supervisory power over inferior courts and tribunals; but it is a special mode, and confined to a limited class of cases.

The general principles upon which the writ of *habeas corpus* is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal Constitution and laws, are to be referred to for our guidance on the subject. A brief reference to the principal authorities will suffice on this occasion.

Lord Coke, before the Habeas Corpus Act was passed, excepted from the privilege of the writ persons imprisoned upon conviction for a crime, or in execution. 2 Inst. 52; Com. Dig., Hab. Corp. B.

The Habeas Corpus Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process. Com. Dig., Hab. Corp. B.

Lord Hale says, "If it appear by the return of the writ that the party be wrongfully committed, or by one that hath

not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed." 2 Hale's H. P. C. 144.

Chief Baron Gilbert says, "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge. Bac. Abr., Hab. Corp. B, 10.

These extracts are sufficient to show, that, when a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course, a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act.

The courts of the United States derive their jurisdiction on this subject from the Constitution and laws of the United States. The fourteenth section of the Judiciary Act granted to all the courts power to issue writs of *scire facias*, *habeas corpus*, and all other writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and to the justices and judges, power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment; but it added a proviso, that the writ should not extend to prisoners in jail, unless in custody under or by color of authority of the United States, or committed for trial before some court of the same, or necessary to be brought into court to testify. It was found necessary to relax the limitation contained in this proviso; and this was done in several subsequent laws. See act of 1833 (4 Stat. 634), passed in consequence of nullification proceedings in South Carolina; act of 1842 (5 Stat. 539), passed in consequence of the *McLeod Case;* and act of 1867 (14 Stat. 44), passed in consequence of the state of things that followed the late rebellion.

The power of the Supreme Court is subject to a further limitation, arising from its constitutional want of original jurisdiction on the subject; from whence it follows that, except in aid of some other acknowledged jurisdiction, it can only issue the writ to review the action of some inferior court or officer. *Ex parte Barry*, 2 How. 65.

From this review of the law it is apparent, therefore, as

before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offence, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163. But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error. We have shown that the court below had power to determine the question before it: and that this is so, is further manifest from the language of Chief Justice Marshall in the case of Tobias Watkins, 3 Pet. 203. He there says, "To determine whether the offence charged in the indictment be legally punishable or not, is among the most unquestionable of its [the court's] powers and duties."

But after the thorough investigation which has been given to this subject in previous cases, particularly those of *Ex parte Yerger*, 8 Wall. 85, and *Ex parte Lange*, 18 id. 163, it is unnecessary to pursue the subject further at this time.

The last-mentioned case is confidently relied on as a precedent for allowing the writ in this case. But the two are totally unlike. In *Ex parte Lange* we proceeded on the ground, that, when the court rendered its second judgment, the case was entirely out of its hands. It was *functus officio* in regard to it. The judgment first rendered had been executed and satisfied. The subsequent proceedings were, therefore, according to our view, void.

But, in the case before us, the District Court had plenary jurisdiction, both of the person, the place, the cause, and every thing about it. To review the decision of that court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court.

Since the cause was submitted to the court, the learned counsel for the petitioner has called its attention to the case

of *Booth and Rycroft*, 3 Wis. 157, as a case precisely in point in favor of granting the writ. It had probably escaped the recollection of counsel that this very case was reversed by this court in *Ableman* v. *Booth*, 21 How. 506, in which Chief Justice Taney delivered one of his most elaborate and able opinions.

As the entire record has been brought before us by the petition, and we are clear as to our want of authority to discharge the prisoner, the application for the writ is *Denied.*

NEW YORK LIFE INSURANCE COMPANY *v.* STATHAM ET AL.

SAME *v.* SEYMS.

MANHATTAN LIFE INSURANCE COMPANY *v.* BUCK, EXECUTOR.

1. A policy of life assurance which stipulates for the payment of an annual premium by the assured, with a condition to be void on non-payment, is not an insurance from year to year, like a common fire policy; but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making, by its non-performance, the policy void.
2. The time of payment in such a policy is material, and of the essence of the contract; and a failure to pay involves an absolute forfeiture, which cannot be relieved against in equity.
3. If a failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insist on the condition; but in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid.
4. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or a suit in equity.
5. The doctrine of revival of contracts, suspended during the war, is based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive, — as where time is of the essence of the contract, or the parties cannot be made equal.
6. The average rate of mortality is the fundamental basis of life assurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company.

THE first of these cases is here on appeal from, and the second and third on writs of error to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg, Miss.; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company, in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the pay-

ment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. Matt. H. Carpenter and *Mr. James A. Garfield* for the appellant in the first case, and for the plaintiff in error in the second. The third case was submitted by *Mr. Alfred Pitman* for the plaintiff in error.*

The rights involved depend upon the contract. The court will not interpolate new conditions, but hold the parties to their agreement. *Dermott* v. *Jones*, 2 Wall. 1; *Jeffreys* v. *Life Ins. Co.*, 22 id. 47. It consists of two parts, and is divisible. The payment of the first premium accomplished two things: *First*, it effected an insurance upon the life of the applicant for one year, which is, so far as he is concerned, an executed contract. Should he die within that specific period, the company absolutely covenants to pay the amount of the policy. *Second*, it purchased the option of his making the stipulated payments, and thus continuing the insurance from year to year, and is in this respect an executory contract. *Worthington* v. *Charter Oak Life Ins. Co.*, 41 Conn. 372. The provisions requiring payment of the agreed premium for each subsequent year are an essential part of the substance of the contract, by which the duration of the risk is limited and defined, and are not a condition in the nature of a penalty. *Dean* v. *Nelson*, 10 Wall.

* The arguments submitted by the counsel separately are presented as a whole, no attempt being made to assign to each what he chiefly or alone may have said. The point as to the surrender value of the policy was, however, made by *Mr. Garfield*, in his concluding argument for the companies.

158. They declare that the policy, if the requisite premium is not paid, expires by its own limitation; but if the court considers that they create a condition, then we insist that it is a condition *precedent* to the renewal and extension of the risk. Until its performance, no liability is incurred by the underwriter, and no right vests in the policy-holder. *Want et al.* v. *Blunt et al.*, 12 East, 183; *Phœnix Life Ins. Co.* v. *Sheridan*, 8 Ho. of Lds. Cas. 745; Law R. 9 Ch. 502; id. 9 Eq. 705; id. 17 Eq. 316–320. An impossibility to perform it does not prevent the loss which results therefrom; nor will a court of equity relieve against the consequences of a breach, although such impossibility be occasioned by law. Salk. 231, 233; 3 Vern. 338, 339, 344; 1 id. 223; 1 Bro. Ch. 168; *Earl of Shrewsbury* v. *Scott*, 6 C. B. N. S. 1; *Barker* v. *Hodgson*, 3 M. & S. 267.

From the beginning of the war until the President's proclamation of Aug. 6, 1861, the assured, who lived within the rebel States, had full opportunity and permission to withdraw to loyal territory. His duty in such a case is clearly indicated in *Mrs. Alexander's Cotton*, 2 Wall. 421, and *The William Bagley*, 5 id. 377. He elected to remain within the jurisdiction of the enemy. The result of his choice cannot be pleaded as an excuse for non-performance; nor can relief be claimed on the ground insisted upon by the other side, that, when the annual premium became due, its payment was rendered unlawful by the existence of war.

The contract, under the circumstances, and by his own voluntary act, was, if for no other reason, made void by the war; because its continued existence depended upon the performance of certain conditions by a person who remained within the Confederate lines, when all intercourse was prohibited by law. *Hanger* v. *Abbott*, 6 Wall. 536; Duer on Insurance, 473, note 2; *Thompson* v. *United States*, 15 Wall. 400. As insurance of the property or lives of enemies violates the laws of war, all such continuing policies are annulled when hostilities commence between the countries where the insurance company and the assured respectively reside. The war, *ipso facto*, dissolved the contracts sued on. *Furtado* v. *Rogers*, 3 Bos. & Pull. 191. There can be no well-founded distinction between a promise

to indemnify a hostile country and one to indemnify its citizen or subject, though a non-combatant, against loss of life. Upon his death, should the contract be valid, and the non-performance of the condition which he has assumed be waived, an absolute right to a sum of money accrues, even though payment might not be enforced until the close of the war. We also insist, that during the war, and when the insured died, the contract, by its own limitation, or by reason of the non-performance of the condition, ceased and determined. The ground taken on the other side is, that only the particular clause requiring the stipulated annual payment was suspended, and that no loss arises from a non-compliance with its terms. This extraordinary result then follows. The contract, so far as the company is concerned, remains in force, and absolutely binds it, whilst the enemy is excused from performance. Should the insured survive the war, there would be no obligation to pay the back premiums, the contract being unilateral; if he dies, the assured can claim, as is done in these cases, the amount of the policy.

But if the court should reject these views, and hold that the defences are not a valid bar to a recovery in these suits, it will not affirm the judgments and decree for the entire amount of the several policies. If any equitable adjustment of the matters in controversy be made, the policy-holder, whose policy was alive when the war began, should not be entitled to any thing beyond its surrender value at that date. Such an adjustment would not impose on the assured the forfeiture of the premiums paid, or on the company the hardship of paying all lapses, whether voluntary or involuntary.

Mr. Clinton L. Rice for the appellees in the first case, and *Mr. Joseph Casey* for the defendant in error in the second. The third case was submitted by *Mr. W. P. Harris* for the defendant in error.

A contract of insurance, when made upon and for the life of the insured, is a contract for life, and not from year to year. *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt. 620; *Reese* v. *Mut. Benefit Life Ins. Co.*, 26 Barb. 556; *Hodson's Adm'rs* v. *Guard. Life Ins. Co.*, 97 Mass. 144; *Hillyard* v. *Mut. Benefit Ins. Co.*, 37 N. J. 444. The payment of the premiums is a

condition subsequent, the performance of which is excused when rendered illegal by the interdiction of commerce and intercourse in time of war between the countries where the contracting parties respectively reside.

It is not an executory contract of such a nature as to be *ipso facto* terminated or abrogated by a state of war. The war did not, therefore, *proprio vigore*, annul it, or impair any vested right under it. It had no other effect than to suspend the remedy upon, or the performance of, it. *Statham* v. *New York Life Ins. Co.*, 45 Miss. 592; *Cohen* v. *New York Mut. Life Ins. Co.*, 50 N. Y. 610; *Sands* v. *New York Life Ins. Co.*, id. 626; *Manhattan Life Ins. Co.* v. *Warwick*, *supra*; *New York Life Ins. Co.* v. *Clopton*, 7 Bush, 179; *Hamilton* v. *New York Mut. Life Ins. Co.*, 9 Blatch. 234; *Semmes* v. *Hartford Ins. Co.*, 13 Wall. 158; *Griswold* v. *Waddington*, 16 Johns. 438; Bliss on Life Ins. (2d ed.) pp. 657–702. Conditions are void, if, at the time of their creation, their performance is impossible, or afterwards becomes so, by the act of God or the law. *Walker* v. *Osgood*, 53 Me. 432; *Wood* v. *Edwards*, 19 Johns. 205; *Glover* v. *Taylor*, 41 Ala. 124; *People* v. *Bartlett*, 3 Hill, 570; Story's Eq. sects. 1304, 1307; *Brewster* v. *Kitchen*, 1 Ld. Raym. 317; Coke's Com. 206 *a*; 2 Pars. on Contr. 672–674. The non-performance of a condition subsequent, where its performance is a forbidden and unlawful act, does not work a forfeiture of the policy. There is no forfeiture, in the just sense of that term, where the law prohibits performance (*Semmes* v. *Hartford Ins. Co.*, *supra*; *Dean* v. *Nelson*, 10 Wall. 169; *Brewster* v. *Kitchen*, *supra*; *Tenlevey* v. *Hubbard*, 3 B. & P. 291); and every intendment consistent with the contract will be made to prevent a forfeiture. *McAllister* v. *N. E. Mut. Life Ins. Co.*, 101 Mass. 558; *N. E. Mut. Life Ins. Co.* v. *Hasbrook*, 32 Ind. 447; *Helme* v. *Phila. Life Ins. Co.*, 61 Penn. 107; Bliss on Life Ins., sects. 186, 190; *Thompson* v. *St. Louis Mut. Life Ins. Co.*, 52 Mo. 469. On the cessation of hostilities, the former state of things revived, and rights under a valid contract were restored to their original vigor. *United States* v. *Grossmeyer*, 9 Wall. 72; *Montgomery* v. *United States*, 15 id. 395; *United States* v. *Lapene*, 17 id. 601.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, — as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business

would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they

ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Any thing that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and corelated to the cases of all others insured by the same company.

The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party, — an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the

value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge, that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of one thousand dollars, whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings-bank is said to belong to the person who made the deposit.

Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it, — a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and the decree in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily some-

what in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit, perhaps, the prayer for alternative relief might be sufficient to sustain a proper decree; but, nevertheless, the complainants should be allowed to amend their bill, if they shall be so advised.

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

MR. CHIEF JUSTICE WAITE.

I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

MR. JUSTICE STRONG.

While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums: it merely gives him an option to pay or not, and thus to continue the obligation of

the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds; but they hold, at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

MR. JUSTICE CLIFFORD, with whom concurred MR. JUSTICE HUNT, dissenting.

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.

TERRY v. ABRAHAM ET AL.

1. Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he cannot ask its reversal here on any matter which will injuriously affect their interests.
2. When an appellant seeks to reverse a decree because too large an allowance was made to the appellees out of a fund in which he and they were both interested, he will not be permitted to do so when he has received allowances of the same kind, and has otherwise waived his right to make the specific objection which he raises for the first time here.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The case was argued by *Mr. H. Terry* for the appellant, and by *Mr. A. T. Akerman* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

On the twelfth day of July, 1869, Harvey Terry, the appellant, filed his bill in the Circuit Court for the Southern District of Georgia against the Merchants' and Planters' Bank and Hiram Roberts. The bill purported to be brought in behalf of plaintiff and all others in like condition with himself who would unite and contribute to the expenses of the proceeding. It sets out, as the foundation of plaintiff's rights, that he is the owner and holder of a considerable amount of the circulating notes of the bank; that the bank, since 1866, has been insolvent, and refused to redeem its bills; and that, on the eighteenth day of July of that year, it had made to Hiram Roberts, the other defendant, a general assignment of its effects for the benefit of its creditors. This assignment is set out in full as an exhibit to the bill.

It is alleged that Roberts has wholly failed to execute the trust; and the relief sought is, that a receiver may be appointed, who shall take charge of the property so assigned, and who shall administer and close up the affairs of the trust, and distribute the effects among the creditors, as they may be found justly entitled.

A receiver was appointed in accordance with the prayer of the petition, with directions to take possession of the assets of the bank, and to collect its debts; and a master was appointed

to ascertain and report the names of all the creditors entitled to share in the fund, and the amount to be distributed to each of them.

It is on the exceptions taken by the appellant to this report that the only questions arise which this court can notice. There are seven of these exceptions, the second and third of which alone relate to allowances made by the master to creditors, represented by Stone and Akerman, as attorneys in the case. The other exceptions relate to allowances in favor of other creditors, who are not parties to this appeal. The appellant, in taking his appeal, expressly limited it to the creditors represented by Stone and Akerman, and procured an order of severance as to the others, and the allowance of the appeal as between appellant and those parties alone. Conceding the appeal to be good as to these parties, and the issues between them (which is a little doubtful), it is very clear that no modification of the decree can be had here to the prejudice of those who were parties below and are not parties here.

This principle disposes also of the alleged error of the court in refusing to allow a reasonable compensation for services of plaintiff's attorney, to be paid out of the general fund before distribution. As appellant had instituted the suit, and carried it on at his own expense, until he procured a decree for distribution of a large fund, in the benefit of which all the creditors participated, we see no good reason why the fund thus realized and distributed should not have been chargeable with the expense incident to the proceeding.

But there may have been a good reason for it; and, if the creditors who shared in the distribution were here as parties, they might be able to sustain the action of the court below. At all events, as no order on the subject could now be made without disturbing their rights under the decree, and as appellant has not thought proper to bring them here, the decree cannot be changed on that subject.

The third exception, which relates to the parties represented by Stone and Akerman, questions an allowance of interest on their claims. The sufficient answer to this is, that appellant claimed and received interest on his claims in precisely the same manner, which made these parties equal in the matter, and

which estops appellant from alleging the action of the court to be error.

The second exception is founded on the allegation contained in it, that the creditors represented by Stone and Akerman, whose claims to the amount of $832,115.76 had been allowed, had, after the assignment, collected from the stockholders of the bank, by legal proceedings, the sum of $197,672 "in the aggregate;" and he raises two points on this part of the master's report: 1st, That these parties should have been allowed nothing at all out of the fund now in court. 2d, That they should have only been permitted to share in the fund after all the other creditors had been made equal by receiving as much in proportion as these had collected by law.

There are several reasons why these exceptions cannot be sustained here. One of these is, that the sum mentioned as realized by the twenty-three creditors represented by Stone and Akerman is stated in the aggregate; and there is no averment of the amount received by each creditor, or that in point of fact each one of the twenty-three received a part of this sum. It is perfectly consistent with the language of the exception that one or two or three of the claimants represented by these attorneys received the whole amount mentioned.

Another objection is, that the record shows that appellant himself had in like manner proceeded at law, and had collected a considerable sum, just in the same manner as these creditors had; and if their action debarred them from any benefit of the trust funds, he was in like manner debarred, and has no standing in court.

Again: though the exception alleges that the money so made by these creditors was realized out of the unpaid stock, by which is probably meant that part of the stock subscribed for and not paid in, the record leaves it in doubt whether it was not collected of stockholders on account of the personal liability which the statute imposed on the shareholder outside of his liability to pay on the stock actually subscribed, with a strong probability that the statutory liability was the principal source of the money so collected.

We are of opinion that the assignment did not carry this statutory liability to the assignee, and that as the purpose of

this bill was to enforce the assignment, and nothing else, the amount received from other sources had no other effect on the rights of creditors than to diminish the amount of their debts on which the dividend was to be estimated.

A circumstance quite as strong against the appellant is, that, though he had, as plaintiff, the control of the management of this suit, he took no steps to have the unpaid stock collected, had no order made for its payment by the shareholders, nor any directions to the receiver to enforce its payment. No other creditor took any step in that direction. Neither the receiver, the other creditors, nor the appellant, have in any manner, up to the argument in this court, looked to that source as part of the fund to be distributed under this assignment.

Under all these circumstances, we hold, that, if any right to collect this unpaid stock passed to the assignee, of which there is great doubt, the parties to this suit have waived and abandoned that right, and the appellant cannot now set it up to reverse this decree. *Decree affirmed.*

SMITH, EXECUTOR, *v.* CHAPMAN, EXECUTOR.

In an action against an executor upon a contract of his testator, where a *devastavit* is not alleged and proved, a judgment *de bonis propriis* is erroneous.

ERROR to the Circuit Court of the United States for the District of Minnesota.

The case was argued by *Mr. W. P. Clough* for the plaintiff in error, and by *Mr. Thomas J. Durant* for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Judgment was recovered in the Supreme Court of the State of New York by George W. Chapman, executor of Eunice Chapman, deceased, against John Gordon, then in full life, since deceased, in the sum of $4,759.80; and it appearing that the judgment was unsatisfied and in full force, and that the judgment debtor had deceased, the judgment creditor brought an action of debt on

that judgment against the executors of the deceased judgment debtor, in which he demanded judgment for the amount recovered against the testator, with lawful interest. Due service was made on the first-named defendant; and he appeared and filed an answer setting up the following defence: That most of the property, rights, and credits of the testator, at the time of his death, were then situated in San Francisco, in the State of California; that the last will and testament of the deceased was duly proved, approved, and recorded in the probate court for the county where the testator died; that letters testamentary, in due form of law, were issued and delivered to P. B. Clark, one of the persons named in his will as executor, and that he, as sole executor of the estate of the decedent, fully administered the same; and that the defendant, at the time of the commencement of the action, had not, nor has he since had, any property, rights, or credits of the deceased in his hands to be administered.

Replications not being allowed by the law of the State, the parties, having waived a jury, went to trial before the court without any further pleadings, and the verdict and judgment were for the plaintiff. Rev. Stat., Minn. 1866, p. 459.

Exceptions were filed by the defendant to the rulings of the court in the progress of the trial; but the court here does not find it necessary to determine the questions raised by the exceptions, as it is clear that the form of the judgment is erroneous, and that the judgment must be reversed for that reason. Enough has already been remarked to show that the action was debt on judgment recovered against the deceased testator of the defendant, and that nothing is alleged in the declaration to show that the defendant has become personally liable for the judgment debt.

Viewed in the light of those suggestions, it is clear that the judgment should have been *de bonis testatoris*, instead of *de bonis propriis*, as shown in the record. Unless an administrator or executor in such a case pleads a false plea, he is not liable to a judgment beyond the assets in his hands to be administered; and it is well settled that a plea of *plene administravit* is not necessarily a false plea, and that the judgment in such a case, even if the plea is not sustained, should be a judgment *de bonis testatoris*. *Siglar* v. *Haywood*, 8 Wheat. 675.

Instead of that, the judgment in this case was as follows: "It is considered by the court, and adjudged, that the plaintiff do have, and recover of and from the defendant, impleaded as aforesaid, the sum of $7,648.33," with interest and costs.

Beyond doubt, the suit in this case was against the defendant, as the executor of the last will and testament of John Gordon, deceased; and it is equally clear, that the declaration does not contain any allegation that the defendant had been guilty of any waste of the assets in his hands, or of any mismanagement in the performance of his duties as executor of the last will and testament of the deceased.

When the suit is against the defendant as executor, and no *devastavit* is alleged, it is clear that a judgment *de bonis propriis* is unwarranted, even if it appear that the defendant has received assets, unless it appears that no assets can be found. *Boyce's Ex'rs* v. *Grundy*, 9 Pet. 275.

Plene administravit is doubtless a good plea, and, if sustained by sufficient evidence, it is a good defence; but the rule is, that the jury, under such a plea, if no *devastavit* is averred, must find the amount of the assets, if any, before any judgment can be rendered. *Fairfax's Ex'r* v. *Fairfax*, 5 Cranch, 19.

Even if it appear that an executor has received assets, still the judgment or decree should be against him, in his representative character, to be levied out of the assets in his hands, when no *devastavit* is averred and proved, unless it appear that no such assets can be found; in which event, the rule is, that the judgment may, if so ordered, be levied out of his own proper goods.

Apply these rules to the case before the court, and it is clear that the judgment is erroneous. *Judgment reversed*

TERRY v. HATCH.

1. Under sect. 692 of the Revised Statutes, an appeal could not be had to this court from the final decree of a Circuit Court, unless the matter in dispute, exclusive of costs, exceeded the sum or value of $2,000.
2. In a suit by its creditors against an insolvent bank, which had made an assignment for their benefit, claims amounting to $440,000, including a decree in favor of A. for $23,297, and judgments in favor of B. for $88,000, were proved and allowed. There was realized under the assignment $30,000, the *pro rata* distribution of which was decreed by the court. A. filed an exception to the allowance of B.'s claim, which was overruled; whereupon he, by leave of the court, took a separate appeal, "without joining any party to the record with him as appellant," or any party as defendant except B. *Held*, that the amount in dispute here is the interest of A. in that portion of the $30,000 payable by the decree to B., which the former would have received had his exception been sustained, and the amount decreed the latter been distributed *pro rata* among all the creditors. As that interest is less than $2,000, this court has no jurisdiction.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Mr. Harvey Terry for the appellant.

Mr. A. T. Akerman, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The Bank of Commerce, located at Savannah, Ga., being insolvent and unable to proceed with its business, made an assignment of its property to John C. Ferrill for the benefit of its creditors, of whom the appellant was one. He commenced this suit "in behalf of himself and all other parties in like condition who will concur and unite and contribute to the expenses," to obtain a decree in his own favor against the bank for the amount of his debt; an account by the assignee; the conversion of the assigned property into money under the authority and direction of the court, and the distribution of the proceeds among the creditors according to the assignment. In the progress of the cause a decree was rendered against the bank and in favor of Terry for $23,297. Afterwards decrees were entered requiring all persons interested in the distribution of the assets to make themselves parties, and referring the cause to a master to take testimony and report the amounts due to the

several claimants, the nature of their respective claims, and the order in which they were entitled to payment out of the fund in court.

The master reported, allowing claims amounting in the aggregate to about $425,000, all of which were entitled to participate *pro rata* in the distribution. Among the claims allowed were the decree in favor of Terry, $23,297, and several judgments in favor of George W. Hatch, amounting in all to $75,000.

Terry excepted to the report, because, —

1. An account of $25 presented by him, and on which he claimed priority of payment over the other creditors, had been disallowed; and, —

2. The claim in favor of Hatch had been allowed.

Both these exceptions were overruled. The amount allowed to Hatch was increased to $88,000, or thereabouts; the report in all other respects confirmed, and an order entered for the payment of the fund in court to the several creditors, in accordance therewith.

The amount of the fund in court for distribution is stated to have been about $30,000, and the total amount of the allowed claims not far from $440,000; so that Hatch would receive for his dividend, under the decree as entered, about $6,000.

Terry took this appeal, which is separate, "without joining any other party to the record with him as appellant," or any party as defendant except Hatch. Such was the order of the Circuit Court when allowing the appeal upon his petition.

Hatch now moves to dismiss, for the reason that the "matter in dispute" is not sufficient in amount or value to give this court jurisdiction.

Sect. 692, Rev. Stat., in force when this appeal was taken, permitted appeals to this court "from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity, and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000."

The matter in dispute between the parties who are here is that part of the money payable to Hatch under the decree which would have gone to Terry if his exceptions had been

sustained. Terry presented an account for $25, on which he claimed priority of payment; but, upon its disallowance, Hatch became entitled to no more than his share upon a *pro rata* distribution of that amount to all the creditors. So, too, Hatch, upon the allowance of his claim, became entitled under the decree to a dividend of about $6,000; but, if it had been disallowed, Terry would have received only his share of the amount of the dividend upon a like *pro rata* distribution. If Terry succeeds in this appeal, he can only recover from Hatch what would have been distributed to him in the court below, if his exceptions had been there sustained. The aggregate of the claims allowed, deducting that of Hatch, is about $350,000; and of this amount Terry has but $23,297. Upon a distribution of the amount decreed to Hatch among the other creditors, the dividend would be less than two per cent upon the amount of the several claims, or but little more than $500 to Terry. It is clear, therefore, that the amount in dispute is less than $2,000. *Appeal dismissed.*

BEAVER v. TAYLOR ET AL.

1. If one of a series of propositions presented to a court as one request for a charge to the jury is unsound, an exception to a refusal to charge the entire series cannot be maintained.
2. An exception to the entire charge of the court, or, in gross, to a series of propositions therein contained, cannot be sustained, if any portion thus excepted to is sound.
3. An exception to such portions of a charge as are variant from the requests made by a party not pointing out the variances, cannot be sustained.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was ejectment brought by plaintiff in error, to recover an undivided sixth part of the north-west quarter of section thirty-six, the north-east fractional quarter of section twenty-seven, the south fractional half of section twenty-six, and the north-east fractional quarter of section thirty-five, in township seventeen south, range one west, situated in the county of Alexander and State of Illinois, at or near the junction of the

Ohio and Mississippi Rivers. The case was tried before a jury, who found the issue for the defendants. A motion for a new trial was made; and thereupon defendants filed a stipulation, that the verdict might be so modified as to show a verdict for the plaintiff in fee-simple to the undivided sixth part of north-east fractional quarter of section twenty-seven, and that judgment might be entered therefor *non obstante veredicto.* Plaintiff refused to consent to said stipulation; and thereupon the motion for a new trial was overruled, and judgment entered for the defendants. It was admitted, on the trial, that the plaintiff at the time of the institution of the suit, July 17, 1854, and at the time of the alleged entry of the defendants, was the owner in fee of one undivided sixth part of the premises mentioned in the declaration, by title derived from Isabella F. Bond, through Joseph B. Holmes, unless said title was barred or divested by the evidence submitted on the part of the defendants; and that the defendants at the same time were the owners in fee of the other five-sixths of said premises, and exercising acts of ownership over the entire premises. The title of defendants to the one-sixth claimed by the plaintiff is based on a claim and color of title to, and seven successive years' possession and payment of taxes upon, the said one-sixth, under sect. 1. of the act of the legislature of March 2, 1839, which is as follows:—

"Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owners of said lands or tenements, to the extent and according to the purport of his or her paper-title. All persons holding under such possession, by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." Rev. Stat. 1874, p. 674.

The defendants, for the purpose of showing claim and color of title made in good faith, introduced in evidence, without objection, a deed from Achsah Bond, as guardian of said Isa-

bella F. Bond, to the Cairo City and Canal Company, of whom the defendants were admitted to be trustees.

The plaintiff requested the court to charge the jury as follows:—

1. It devolves upon the defendants, who rely upon this section of law as a defence to the plaintiffs' action, to prove to the satisfaction of the jury that they, the defendants, or those under and through whom they claim color of title, have had the actual possession of the tracts of land in question for seven successive years prior to the seventeenth day of July, 1854, the date when this action was commenced; that they have paid all taxes legally assessed on the lands during the same seven years.

2. The good faith of the claim and color of title will be presumed, unless, from the evidence, it is made to appear otherwise. If the jury shall find from the evidence that Taylor and Gilbert, the defendants, in 1854, tendered to Craig, the husband of Isabella F. Bond, $2,200, in payment for his wife's interest in the lands in controversy, that is a circumstance that may be taken into consideration, in connection with the other evidence in the case, as tending to rebut the presumption of good faith of defendants under what they have produced as color of title.

3. If, in this case, it shall appear from the evidence that the taxes for any one or more of the seven successive years were paid by Miles A. Gilbert for his own benefit, the payment of taxes cannot avail Taylor and Davis and those claiming under them; the jury are to determine, from all the evidence in the case, whether all the taxes for said seven years were paid on account of Taylor and Davis, or whether for a portion of that time they were paid on account of Miles A. Gilbert.

4. To make out the actual possession of the lands in question, it must appear from the evidence that the defendants, or those under and through whom they claim, during the whole period of seven successive years prior to the seventeenth day of July, 1854, had possession adverse to the legal claim of Isabella F. Bond and those claiming through her. During the whole of that time their possession must have been visibly notorious and exclusive; it must have been manifested by such unequivocal acts of dominion over the lands as would have given the owner of the lands, on reasonable inquiry, constant notice that the

party or persons in possession were using and claiming the lands exclusively as their own.

5. The defendants, to prevent a recovery in this case, must, as to each tract of land in dispute, show, by a preponderance of evidence, actual, visible, open, and notorious possession of the particular tract as to which the jury is inquiring. Possession by defendants of premises not claimed by plaintiff will not make out a defence as to any of the tracts in dispute, nor will possession by defendants of one distinct tract of the several tracts in controversy make out a defence as to any other tract or tracts in dispute.

6. The law permits one tenant in common to possess, use, and enjoy the lands owned by himself and co-tenant, without prejudice to the rights of an absent co-tenant in common. The first section of the limitation law of March 2, 1839, cannot be successfully invoked as a defence to an act of ejectment instituted by the tenant in common out of possession, unless there is evidence to satisfy the jury that the defendant or defendants, the co-tenant or co-tenants in common in possession, has or have been in the open, well-known, exclusive, and adverse possession, claiming the whole of the lands in question for the full period of seven successive years prior to the commencement of such action. The payment of all the taxes assessed on land or lands owned in common by one of the co-tenants is not of itself evidence of an adverse possession on the part of the party who so pays, or who has so paid, the taxes, as against the co-tenant or co-tenants in common out of possession.

7. If in this case the jury are satisfied, from the evidence, that Taylor and Davis, or their agents, up to the year 1850, did no act or acts in and about their alleged possession of the lands in question, except such acts as co-tenants in common had a lawful right to do towards the improvement of said tracts of land, or that they did such acts only as they were legally authorized to do by virtue of the charter to the Cairo City and Canal Company and the deed of release from Achsah Bond, the guardian of Isabella F. Bond, the plaintiff is entitled to recover to the extent as claimed in his declaration, subject to such rights in and over the lands in question as may be claimed

under said charter and the deed of release executed by the guardian of said Isabella F. Bond.

8. The building of dykes, levees, and embankments, for the security and preservation of the city of Cairo, and for the security and preservation of said city and land, and all improvements thereon, from all and every inundation which could possibly affect or injure said city or the improvements therein, was authorized by the first section of the act incorporating the Cairo City and Canal Company, approved March 4, 1837; and the mode of procuring a release of damages occasioned by such building of dykes, levees, and embankments, was provided for by the same act. The deed of release executed to said company by the guardian of Isabella F. Bond, who, at the time, was a minor, was a sufficient authority to said company to warrant them in constructing dykes, levees, and embankments over and across the lands belonging to said minor; but the construction of such improvements was not, and is not, to be taken of itself as evidence of a denial on the part of said company of the legal title and right of possession of said minor, and of those claiming through and under her, to the lands owned by said minor over and across which said improvements may have been constructed.

The court declined to so charge the jury on either and all of said points, as requested by the plaintiff; and, instead thereof, charged and instructed them as follows: —

This suit is brought to recover one-sixth of certain tracts of land in Cairo. Beaver shows title from the government through Isabella F. Bond, who sold it to Holmes, and from whom Beaver bought it. Before Isabella F. Bond sold it to Holmes, in 1852, her guardian, Achsah Bond, on the 22d of May, 1837, reciting the act of the legislature passed March 4, 1837, empowering guardians to release the damages and interest of their wards in lands which the Cairo City Company might take for their use, sold the share of Isabella F. Bond to the Cairo City and Canal Company.

This deed, in the opinion of the court, does not in itself convey title, as the authority conferred by the legislature did not extend to the selling of the land. The plaintiff is therefore entitled to recover, unless the defendants bring themselves

within the provisions of the first section of the act of the legislature of March 2, 1839. By that section, although a paper-title may be defective and fail to divert the title, yet if the purchaser bought the land in good faith, supposing he had a title, the deed he has got can be used as color of title; and if he, under the claim of title, takes possession of the lands, and continues in possession of them for seven years, and pays the taxes on them for the same time, then he is as much the owner of the lands as if his paper-title was perfect.

The court instructs the jury that the deed from Achsah Bond is color of title, within the meaning of the statute, to one-sixth part of the land in controversy. Good faith in buying the property, possession of it for seven years, and payment of taxes during that period, must concur, in order to bring the defendant within the terms of the statute.

Good faith is presumed in the absence of proof to the contrary; and where there is no actual fraud and no proof showing that the color of title was acquired in bad faith, which means in or by fraud, then the title was acquired in good faith. On the question of the payment of taxes, the law is, that the taxes must be paid for the benefit of the party claiming the title.

Gilbert bought these lands in his own name at a tax sale in 1843 and 1845, as he swears, for the benefit of the company, and with their money, for the purpose of getting rid of an old tax-title, being at the time the general agent of the company.

The taxes on the land for 1846 and 1847 were paid in the name of Gilbert, but, as he testifies, with the funds of the company and for their benefit. If the jury believe this testimony is true, then it was a good payment of taxes by the company for those years; and as to the payment of taxes for the remainder of the seven years, there is no question but what they were paid by the company.

In order to defeat the plaintiff's title, the defendants must have had actual possession of the land; but actual possession, in the meaning of the statute, does not require a residence on the lands, nor their enclosure by a fence. If the lands were occupied in such a manner by the defendants as to convey a constant notice to the plaintiff, or those under whom he derives title, that they were claimed adversely to him or them, then

they were, in the sense of the limitation law, in the actual possession of the defendants. In other words, if Isabella F. Bond, or the party claiming under her, could, by visiting the lands, readily see that they were in the actual occupation of the defendants, the statute is complied with. The adverse occupation must have continued for the full period of seven years before the suit was commenced, in order to bar the plaintiff.

It must have been, during all this period, a continuous occupation, and also an undivided one. In this case, the possession by the State of the ten acres now the possession by heirs of Mackenzie does not affect the rights of the parties. But if Galtin was in possession adversely to the defendants, then their possession is not an undivided one to the north-east fractional quarter of section five, on which Galtin had his possession. But if he was in possession under the defendants, or if Gray and Simmons, from whom he bought, were in possession under them, then his possession is consistent with the rights of the defendants, and he had no interest adverse to them; but his possession was the possession of the defendants.

There is no arbitrary rule in relation to what constitutes, under the law, actual possession. There must always be such a manifestation on the part of the claimant as to convey notice to the holder of the legal title that he is claiming adversely to his or her interest. The way in which this is done may be very different in the case of a tract of land for a farm, or tracts of land purchased for the purpose of being laid out into city lots.

The legislature of Illinois incorporated in 1837 the Cairo City and Canal Company, and authorized them to purchase the whole of township seventeen, and to lay the whole, or such parts of it as they saw fit, into city lots. If the jury believe from the evidence that the company did purchase the tracts of land in controversy (all being in township seventeen) for purposes authorized by the statute; and that during the period of seven years, before this suit was begun, the defendants constructed levees and embankments for the purpose not only of preserving the then city of Cairo from inundation, but also these lands, with a design of ultimately incorporating them into the city; and that these levees and embankments enclosed or crossed parts of the lands, so that the legal owner of the interest in controversy

could readily see that they were occupied by the defendants; and timber was cut upon them in such manner by the defendants, or those having permission from them, as to convey notice to the owner of the adverse interest, — then the defendants had such possession under color of title as will protect them.

If, on the contrary, the levees and embankments were constructed for the sole purpose of protecting the then city of Cairo, and the cutting of the timber was done in such a manner that the party holding the legal title could not see that it was done, then the defendants are not protected. If the embankments were made to protect these lands, as well as what was then known as the city of Cairo, and they run across a part of them, and all the lands were designed for a common purpose, then the occupation by the levees of a part of the lands was the occupation of the whole.

The rights of a tenant in common are not involved in this controversy. If the defendants believed that they purchased the interest of Isabella F. Bond, and occupied the premises adversely to her interest, they are protected, notwithstanding the interest was undivided, they owning the remaining five-sixths.

The construction of levees by the Illinois Central Railroad before the suit was commenced, under contract with the defendants, serves the same purpose as if they were constructed by the defendants.

The plaintiff is entitled to recover the one-sixth of north-east fractional quarter of twenty-seven, there being no disclaimer of title by the defendants, unless the same was occupied by the defendants adversely for seven years prior to the bringing of this suit, it making no difference under the state of the pleadings whether the land has been washed away by the Mississippi River or not.

The plaintiff at the time excepted to the refusal of the court to charge the jury on the several points of law as by him requested, and also excepted at the time to so much of the charge of the court as given, as in conflict with and variant from the several propositions urged and submitted as the law by and on behalf of the plaintiff. The jury found that defendants were in possession of the premises and paid the taxes for

seven successive years, as required by the statute; and the only questions in the case arise upon the charge of the court to the jury, and its refusal to give the instructions, as asked.

Submitted on printed argument by *Mr. Lyman Trumbull* for the defendants in error. No counsel appeared for the plaintiff in error.

MR. JUSTICE HUNT delivered the opinion of the court.

This action was ejectment to recover an undivided interest in certain lands situate in Cairo, Ill. The defence was actual possession under claim and color of title for seven successive years, and payment during that period of all taxes legally assessed upon the premises claimed. Rev. Stat. of Ill., 1874, p. 674.

Evidence was given sustaining the defence, and a verdict by the jury was rendered in favor of the defendants.

Before the case was submitted to the jury, the plaintiff requested the court to charge, as set forth by him, in eight several propositions. The court declined to charge as requested, but charged in its own language, and fully, upon the case as presented by the evidence.

The plaintiff excepted to the refusal of the court, and excepted also "to so much of the charge of the court as given, as was in conflict with and variant from the several propositions" presented by him.

It is upon this presentation of the case that this court is asked to reverse the judgment entered upon the verdict.

1. The entire series of propositions was presented as one request; and, if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained. 11 N. Y. 416; 6 id. 233; 7 id. 236. All of the propositions presented were not sound; notably the fifth request could not be complied with.

2. If the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion thus excepted to is sound, the exception cannot be sustained. *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 id. 328; 5 Denio, 213; *Jones* v. *Osgood*, 2 Seld. 233; *Caldwell* v. *Murphy*, 11 N. Y. 416; *Walsh* v. *Kelly*, 40 id. 556. The charge before us was confessedly sound in the most of its points.

3. An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variances, cannot be sustained. 40 N. Y. 556; 45 id. 129; 47 id. 570. It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and the charge, to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so. *Ayrault* v. *The Pacific Bank*, 47 N. Y. 576. An exception in the form we are considering entirely defeats that object.

For these three reasons, the bill of exceptions fails to present any point that we can consider.

We are also of the opinion, upon an examination of the record, that the case was well submitted to the jury, and that the plaintiff has no just ground of complaint.

Judgment affirmed.

GRYMES v. SANDERS ET AL.

1. A mistake as to a matter of fact, to warrant relief in equity, must be material; and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.
2. Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person."
3. Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract, as if the mistake or fraud had not occurred. This applies peculiarly to speculative property, which is liable to large and constant fluctuations in value.
4. A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The case was argued by *Mr. Conway Robinson* and *Mr. Leigh Robinson* for the appellant, and by *Mr. Edwin L. Stanton* and *Mr. George M. Dallas* for the appellees.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The appellant was the defendant in the court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was on his part any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others.

The case rests entirely upon the ground of mistake. The question presented for our determination is whether that mistake was of such a character, and attended with such circumstances, as entitle the appellees to the relief sought by their bill and decreed to them by the court below.

Peyton Grymes, the appellant, owned two tracts of land in Orange County, Va., lying about twenty-five miles from Orange court-house. The larger tract was regarded as valuable, on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the appellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above $20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself at the court-house upon their arrival. The conveyance was provided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court-house in time to take a designated train east the ensuing

day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court-house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface-gold, and then took him to an abandoned shaft, which he supposed was on the premises. There Fisher examined the quartz and other *débris* lying about. But a very few minutes had elapsed when Grymes announced that his team was ready. The party immediately started back to the court-house. Arriving too late for the train, they drove to the house of the appellant: and Fisher remained there until one o'clock that night. While Fisher was there, considerable conversation occurred between him and the appellant in relation to the property; but it does not appear that any thing was said material to either party in this controversy. Fisher proceeded to Philadelphia, and reported favorably to Lanagan, and subsequently, at his request, to Repplier, who became a party to the negotiation. He represented to both of them that the abandoned shaft was upon the premises. Catlett went to Philadelphia, and there he sold the property to the appellees for $25,000. Fisher was sent to the court-house to investigate the title. He employed Mr. Williams, a legal gentleman living there, to assist him. A deed was prepared by Mr. Williams, and executed by the appellant on the 21st of March, 1866. On the 7th of April ensuing, the appellees paid over $12,500 of the purchase-money, and gave their bond to the appellant for the same amount, payable six months from date, with interest. The deed was placed in the hands of a depositary, to be held as an escrow until the bond should be paid. Catlett, under a power of attorney, received the first instalment, paid over to the appellant $10,000, and retained the residue on account of the compensation to which he was entitled under the contract between them. The vendees requested Hume to hold possession of the property for them until they should make some other arrangement. He occupied the premises until the following July, when, with their consent, he transferred the possession to Gordon. In that month, Lanagan and Repplier came to see

the property. Hume was there washing for gold. He began to do so with the permission of the appellant before the sale, and had continued the work without intermission. The appellees desired to be shown the boundary-lines. Hume said he did not know where they were, and referred them to Johnson. Johnson came. The appellees desired to be taken to the shaft which had been shown to Fisher. Johnson said it was not on the premises. Hume thought it was. Johnson was positive; and he was right. The appellees seemed surprised, but said little on the subject. They proceeded to examine the premises within the lines, and, before taking their departure, employed Gordon to explore the property for gold. Subsequently this arrangement was abandoned, and they paid him for the time and money he had expended in getting ready for the work. In September, they sent Bowman as their agent to make the exploration. On his way, he stopped at the court-house, and told the appellant that the shaft shown to Fisher as on the land was not on it. The appellant replied instantly, "that there was no shaft on the land he had sold to Repplier and Lanagan, and that he had never represented to any one that there was a shaft on the land, and that he had never authorized any one to make such a representation, nor did he know or have reason to believe that any such representation had, in fact, been made by any one." It does not appear that his attention had before been called to the subject, or that he was before advised that any mistake as to the shaft had occurred. Bowman spent some days upon the land, and made a number of cuts, all of which were shallow. The deepest was only fifteen feet in depth. It was made under the direction of Embry and Johnson, two experienced miners living in the neighborhood. It reached a vein of quartz, but penetrated only a little way into it. They thought the prospect very encouraging, and urged that the cut should be made deeper.

Bowman declined to do any thing more, and left the premises. No further exploration was ever made. Johnson says, "I know the land well, and know there has been gold found upon it, and a great deal of gold, too, — that is to say, surface-gold, — but it has never been worked for vein-gold. The gold that I refer to was found by the defendant, Grymes, and those that

worked under him." He considered Bowman's examination "imperfect and insufficient." He had had "twenty-three years' experience in mining for gold."

Embry's testimony is to the same effect, both as to the surface-gold and the character of the examination made by Bowman. The premises lie between the Melville and the Greenwood Mines. Before the war, a bucket of ore, of from three to four gallons, taken from the latter mine, yielded $2,400 of gold. This, however, was exceptional. In the spring of 1869 a vein was struck, from forty to fifty feet below the surface, yielding $500 to the ton. Work was stopped by the influx of water. It was to be resumed as soon as an engine, which was ordered, should arrive. Ore at that depth, yielding from eight to ten dollars a ton, will pay a profit. Embry says he is well acquainted with the courses of the veins in the Melville and the Greenwood Mines, and that "the Greenwood veins do pass through the land in controversy, and some of the Melville veins do also." Speaking of Bowman and his last cut, he says: —

"At the place I showed him where to cut he struck a vein, but just cut into the top of it; he did not go down through it, or across it. From the appearance of the vein, I was very certain that he would find gold ore, if he would cut across it and go deep into it, and I told him so at the time; but he said that they had sent for him to return home, and he couldn't stay longer to make the examination, and went off, leaving the cut as it was; and the exploration to this day has never been renewed. I am still satisfied, that, whenever a proper examination is made, gold, and a great deal of it, will be found in that vein; for it is the same vein which passes through the Greenwood Mine, which was struck last spring, and yielded $500 to the ton. His examination in other respects, as well as this, was imperfect and insufficient. I don't think he did any thing like making a proper exploration for gold. I don't think he had more than three or four hands, and they were not engaged more than eight or ten days at the utmost."

In September, 1866, Repplier instructed Catlett to advise the appellant, that, by reason of the mistake as to the shaft, the appellees demanded the return of the purchase-money which

had been paid. In the spring of 1867, Lanagan, upon the same ground, made the same demand in person. The appellant replied, that he had parted with the money. He promised to reflect on the subject, and address Lanagan by letter. He did write accordingly, but the appellees have not produced the letter. This bill was filed on the 21st of March, 1868.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. Kerr on Mistake and Fraud, 408; *Trigg* v. *Read*, 5 Humph. 529; *Jennings* v. *Broughton*, 17 Beav. 541; *Thompson* v. *Jackson*, 3 Rand. 507; *Harrod's Heirs* v. *Cowan*, Hardin, 543; *Hill* v. *Bush*, 19 Barb. (Ark.) 522; *Jouzan* v. *Toulmin*, 9 Ala. 662.

Does the case in hand come within this category?

When Fisher made his examination at the shaft, it had been abandoned. This was *prima facie* proof that it was of no account. It does not appear that he thought of having an analysis made of any of the *débris* about it, nor that the *débris* indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises, they said nothing about abandoning the contract, and nothing which manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan

saw and talked several times with Williams, who had prepared the deed. Williams says, "I cannot recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Houseworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." Kerr on Fraud and Mistake, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary-lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In *Manser* v. *Davis*, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of

proper diligence. See also *Seton* v. *Slade*, 7 Ves. 269; 2 Kent's Com. 485; 1 Story's Eq., sects. 146, 147; *Atwood* v. *Small*, 6 Cl. & Fin. 338; *Jennings* v. *Broughton*, 17 Beav. 141; *Campbell* v. *Ingilby*, 1 De G. & J. 405; *Garrett* v. *Burleson*, 25 Tex. 44; *Warner* v. *Daniels et al.*, 1 Woodb. & M. 91; *Ferson* v. *Sanger*, id. 139; *Lamb* v. *Harris*, 8 Ga. 546; *Trigg* v. *Read*, 5 Humph. 529; *Haywood* v. *Cope*, 25 Beav. 143.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. *Thomas* v. *Bartow*, 48 N. Y. 200; *Flint* v. *Wood*, 9 Hare, 622; *Jennings* v. *Broughton*, 5 De G., M. & G. 139; *Lloyd* v. *Brewster*, 4 Paige, 537; *Saratoga & S. R. R. Co.* v. *Rowe*, 24 Wend. 74; *Minturn* v. *Main*, 3 Seld. 220; 7 Rob. Prac., c. 25, sect. 2, p. 432; *Campbell* v. *Fleming*, 1 Ad. & El. 41; Sugd. Vend. (14th ed.) 335; *Diman* v. *Providence, W. & B. R. R. Co.*, 5 R. I. 130.

A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant. *Hunt* v. *Silk*, 5 East, 452; *Minturn* v. *Main*, 3 Seld. 227; *Okill* v. *Whittaker*, 2 Phill. 340; *Brisbane* v. *Davies*, 5 Taunt. 144; *Andrews* v. *Hancock*, 1 Brod. &

B. 37; *Skyring* v. *Greenwood*, 4 Barn. & C. 289; *Jennings* v. *Broughton*, 5 De G., M. & G. 139.

The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. *Segur* v. *Tingley*, 11 Conn. 142; *Haywood* v. *Cope*, 25 Beav. 140; *Jennings* v. *Broughton*, 17 id. 232; *Atwood* v. *Small*, 6 Cl. & Fin. 497; *Marvin* v. *Bennett*, 8 Paige, 321; *Thomas* v. *Bartow*, 48 N. Y. 198; *Hunter* v. *Goudy*, 1 Ham. 451; *Halls* v. *Thompson*, 1 Sm. & M. 481.

The bill, we have shown, cannot be maintained.

In our examination of the case, we have assumed that those who are alleged to have spoken to the agent of the appellees upon the subject of the shaft, before the sale, had the requisite authority from the appellant.

Considering this to be as claimed by the appellees, our views are as we have expressed them. We have not, therefore, found it necessary to consider the question of such authority; and hence have said nothing upon that subject, and nothing as to the aspect the case would present if that question were resolved in the negative.

Decree reversed, and case remanded with directions to dismiss the bill.

BIRDSALL ET AL. v. COOLIDGE.

1. In an action at law for the infringement of letters-patent, the rule as to the measure of damages is, that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict not exceeding three times that amount, together with costs.
2. Where the unlawful acts consist in making and selling a patented improvement, or in its extensive and protracted use, without palliation or excuse, evidence of an established royalty will, in an action at law, undoubtedly furnish the true measure of damages; but where the use is a limited one, and for a brief period, the arbitrary and unqualified application of that rule is erroneous.

ERROR to the Circuit Court of the United States for the District of Nevada.

Submitted on printed arguments by *Mr. C. J. Hillyer* for the appellants, and by *Mr. A. H. Evans* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Juries, in an action at law for the infringement of a patent, are required to find the actual damages sustained by the plaintiff in consequence of the unlawful acts of the defendant. Power is given to the court, in such a case, to enter judgment for any sum above the amount of the verdict, not exceeding three times the amount of the same, together with costs; but the jury are strictly limited in their finding to the actual damages which the plaintiff has sustained by the infringement. 16 Stat. 207; 5 id. 123; Rev. Stat., sect. 4914, p. 960.

Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party. 2 Greenl. Ev. (10th ed.) sect. 253.

Improvements in machines for amalgamating gold and silver were made by Zenas Wheeler, then in full life, for which he received letters-patent in due form of law. Sufficient also

appears to show that the patentee subsequently — to wit, on the 15th of August, 1869 — departed this life; that, at the time of his death, he was a resident of San Francisco, in the State of California, and that he left a last will and testament, duly executed, as required by the laws of that State; that he gave, devised, and bequeathed to the plaintiff all and singular his property, real and personal, wheresoever situated, including all debts owing to him, and all moneys belonging to him of which he might die seised and possessed, in trust for certain uses and purposes therein specifically set forth and described, leaving his patent-rights, machinery, and certain other specified interests, in the hands of his executor, to be managed, controlled, improved, changed, or disposed of, as his executor may in his judgment deem best for the interests of the estate. Due probate of the will has since been made, and letters testamentary have been duly granted to the plaintiff, as sole executor of the deceased patentee.

Pursuant to the power vested in the plaintiff as such executor, he instituted the present suit, in which he alleges that the deceased testator was the original and first inventor of the improvement described in the patent, and that the defendants, though well knowing the premises, and in order to deprive the plaintiff of the gains and profits of the same, have, without license from the testator in his lifetime, or from the plaintiff since the decease of the testator, used and caused to be used twenty amalgamating machines, embracing substantially the same improvement, in violation and infringement of the exclusive right secured by the said letters-patent.

Service was made; and the defendants appeared and pleaded the general issue, and gave notice of certain special defences, as follows: 1. That the testator in his lifetime executed a license to J. Booth & Co., to manufacture the patented machine, and that the defendants purchased the machines they use of the licensees. 2. That the patented improvement has been openly and universally used by the public since the patent was granted. 3. That the curved grooves in the face of the muller and in the bottom of the pan had been previously patented to the respective parties named in the notice of special matter. 4. That the patentee was not the original and

first inventor of the improvement. 5. That the curved grooves in the face of the muller and bottom of the pan were in public use more than two years before the alleged inventor made application for a patent. 6. That the patented improvements were described in the printed publications mentioned in the notice of special matter.

Reference to the specification will show that the patented improvement is called a new and improved gold and silver amalgamator and pulverizer, and that the object of the invention, as stated by the patentee, is to obtain a device of simple construction, which will cause a thorough incorporation of the quicksilver with the pulp containing the metal, so as to insure a perfect amalgamation of the latter. Mechanically considered, the invention consists in the arrangement of spiral ribs on the periphery of the rotary muller, and spiral ribs reversed on the inner side of the pan, to operate in connection with curved grooves on the face or under side of the muller, and curved grooves reversed in the bottom of the pan, for the purpose explained.

These explanations are the same as those given in the specification; and the patentee also states, that the invention consists in the manner of connecting the muller to its shaft by a universal joint, so as to insure its parallelism with the bottom of the pan, and in the employment or use of curved plates, which are placed in the pan just above the muller, and arranged in such a manner as to be capable of being adjusted higher or lower, as set forth in the specification.

Two of the claims of the patent — to wit, the first and second — are omitted, as the plaintiff admits that those claims have not been infringed by the defendants. What he charges is, that they have infringed the third claim, which is as follows: "In combination with the muller and pan, the curved plates supported at their outer ends on slides, and at their inner ends in a frame, which is supported on the upper end of the shaft in such a manner that the plates will follow any adjustment of the muller, and thus bear the same relation to it, whether in its highest or lowest working position."

Viewed in the light of these suggestions, it is clear that the charge of infringement has respect chiefly to the curved plates

supported, as explained, when used in combination with the muller and pan.

Subsequently the parties went to trial; and the verdict and judgment were for the plaintiff, in the sum of $2,266.66, with costs of suit. Exceptions were duly filed by the defendants, and they sued out the present writ of error.

By the bill of exceptions, it appears that the plaintiff introduced his patent in evidence, together with a model of the patented machine for amalgamating gold and silver, and gave testimony tending to show that the defendants purchased twenty amalgamating pans, which contained wings or curved plates of iron twelve inches wide and fourteen inches long, fastened at one end to the inner side of the rim of the pans in a vertical position, in such a manner that they could be raised or depressed by sliding up or down in a groove or fastening, and could be adjusted at different heights, and extending lengthways towards the centre of the pans, which were a little more than four feet in diameter.

Wings of the kind, however, were used in only sixteen of the pans for a few weeks after the defendants commenced to use the pans for amalgamating purposes; and the defendants testified that the wings were useless, and even detrimental, for working over old tailings, which was the work on which they were engaged, for the reason that such material does not require further grinding or pulverization; that, finding the wings useless or detrimental, they took them out of the sixteen pans, and sold them for old iron.

They also gave evidence tending to show, that, when they used the mill as a quartz-mill, they used the wings in sixteen only of the pans, but that when they commenced to work what are called "tailings," they took out the wings, because they found them to be detrimental or useless; and the bill of exceptions also states that the defendants took the wings out of four of the pans before they used them at all, and only used the wings in some of the other pans for a short time, and that they did not use any of them more than six weeks: which is all the evidence introduced to show the extent of the infringement.

Wide differences of opinion existed between the parties as to the rule of damages in such a case; and, to aid in the solu-

tion of that question, the plaintiff introduced testimony tending to show that the decedent in his lifetime allowed manufacturers to make and sell the invention for a royalty of $100 for a machine containing only the same combination as that used by the defendants, and proved that he, the plaintiff, had sold royalties to a large amount at the same rate.

Questions of various kinds, other than those relating to the measure of damages, are also presented in the bill of exceptions; but the court here, in the view taken of the case, do not find it necessary to decide any other in this investigation.

Instructions as to the measure of damages were given by the court to the jury, in substance and effect as follows: That when a person, without license, appropriates the patented invention of another, the measure of damages, if a royalty has been established, is the regular royalty paid by purchasers and licensees; that, if the jury find for the plaintiff, the damages will be the royalty which the plaintiff established for that part of the invention used by the defendants; that, if the royalty paid for that part of the invention is $100, then the jury will allow $100 *on each pan* used by the defendants, and interest on that sum, at ten per cent per annum, for the time of the appropriation, which is the rate of interest allowed in that State.

Under those instructions the jury returned a verdict for the plaintiff in the sum of $2,266.66, as appears by the record. Seasonable exception was taken to the instructions by the defendants, and that instruction presents the only question which the court deems it necessary to decide in disposing of the case.

Controversies and cases arising under the patent laws are originally cognizable, as well in equity as at law, by the circuit courts, or by any district court having circuit powers. Prior to the passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two: he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of the patent as respects such gains and profits; or

the owner of the patent might sue at law, in which case he would be entitled to recover, as damages, compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts, — the measure of damages in such case being not what the defendants had gained, but what the plaintiff had lost. Curtis on Pat. (4th ed.) 461; 5 Stat. 123.

Where the suit is at law, the measure of damages remains unchanged to the present time, the rule still being, that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs. 16 Stat. 207.

Damages of a compensatory character may also be allowed to the complainant suing in equity, in certain cases, where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is, that the complainant "shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby."

Cases occurred under the prior patent act where manifest injustice was done to the complainant in equity suits, by withholding from him a just compensation for the injury he sustained by the unlawful invasion of his exclusive rights, even when the final decree gave him all that the law allowed. Examples of the kind may be mentioned where the business of the infringer was so improvidently conducted that it did not yield any substantial profits, and cases where the products of the patented improvements were sold greatly below their just and market value, in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented product.

Courts could not, under that act, augment the allowance made by the final decree, as in the case of the verdict of a jury;

but the present patent act provides that the court shall have the same powers to increase the decree, in its discretion, that are given by the act to increase the damages found by verdicts in actions at law. Such difficulties could never arise in an action at law, nor can it now, as both the prior and the present patent act authorize the court to enter judgment on the verdict of the jury for any sum above the verdict, not exceeding three times that amount. No discretion is vested in the jury; but they are required to find the *actual damages*, under proper instructions from the court.

Still, it is obvious that there cannot be any one rule of damages prescribed which will apply in all cases, even where it is conceded that the finding must be limited to actual damages. Frequent cases arise where proof of an established royalty furnishes a pretty safe guide both for the instructions of the court and the finding of the jury. Reported cases of undoubted authority may be referred to which support that proposition; and yet it is believed to be good law, that the rule cannot be applied without qualification, where the patented improvement has been used only to a limited extent and for a short time, but that in such a case the jury should find less than the amount of the license fee; and it is admitted in several cases that the circumstances may be such that the finding should be larger than the royalty. *Seymour* v. *McCormick*, 16 How. 490; *Livingston* v. *Woodworth*, 15 id. 560; *Dean* v. *Mason*, 20 id. 203; Curtis on Pat. (4th ed.) 459.

Evidence of an established royalty will undoubtedly furnish the true measure of damages in an action at law, where the unlawful acts consist in making and selling the patented improvement, or in the extensive and protracted use of the same, without palliation or excuse; but where the use is a limited one and for a brief period, as in the case before the court, it is error to apply that rule arbitrarily and without any qualification. *Packet Co.* v. *Sickles*, 19 Wall. 617; *Burdell et al.* v. *Denig et al.*, 92 U. S. 716; *Suffolk Co.* v. *Hayden*, 3 Wall. 320.

Four of the pans in this case were used throughout without wings, and wings in most of the others were used only for a short time, and in none of the pans for more than six weeks.

Under these circumstances, it was error to charge the jury, that, if they found any damages, they must find the amount of the royalty for each pan so used, as that was instructing the jury in effect that they must find $100 for each pan, which is plainly more than the actual damages proved by the evidence. Actual damage is the statute rule; and, whenever the royalty plainly exceeds the rule prescribed by the Patent Act, the finding should be reduced to the statute rule.

Judgment reversed, and cause remanded with directions to issue a venire de novo.

HURST v. WESTERN AND ATLANTIC RAILROAD COMPANY.

Under the act of March 2, 1867 (14 Stat. 558), a suit pending in a State court, between a citizen of the State in which the suit was brought and a citizen of another State, could not, on the application of the former, be removed to a circuit court of the United States.

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

Hurst, the plaintiff in error, a citizen of Tennessee, sued the Western and Atlantic Railroad Company, a corporation of Georgia, in the law court of Chattanooga, Tenn., at its October Term, 1866. The cause was tried at the February Term, 1868, of that court, and resulted in a judgment in favor of Hurst. The Supreme Court of the State, at its October Term, 1869, reversed this judgment, and sent the cause back for a new trial. At the June Term, 1870, of the law court, the July Term, 1871, and the March Term, 1872, trials were had, in which the juries disagreed. At the July Term, 1872, after trial, another judgment was rendered in favor of Hurst. This judgment, too, the Supreme Court reversed, at its September Term, 1872, and the cause was again remanded for trial. Nov. 12, 1873, Hurst applied to the law court for a removal of the cause to the Circuit Court of the United States for that district, under the act of March 2, 1867. 14 Stat. 558. Upon this application the cause was removed; but the Circuit Court, when it came there, refused to take jurisdiction, and remanded it to the State court.

This action of the Circuit Court is assigned here for error.

Mr. Henry Cooper for the plaintiff in error.
Mr. John Baxter, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The act of March 2, 1867, provided, in substance, that where a suit was pending in a State court, between a citizen of the State in which the suit was brought and a citizen of another State, and the matter in dispute exceeded the sum of $500, *such citizen of another State*, whether plaintiff or defendant, if he made and filed in such State court an affidavit, stating "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court," might have the cause removed to the Circuit Court of the United States. Here the suit was brought in a court of the State of Tennessee, by a citizen of that State, against a citizen of the State of Georgia. Under the statute, the party who was a citizen of Tennessee could not have the cause removed to the Circuit Court, because he was a citizen of the State in which the suit was brought, and not of "another State;" but the citizen of Georgia could. In this case, the removal was made upon the application of the party who was a citizen of Tennessee, and, consequently, the Circuit Court properly refused to entertain jurisdiction. *Judgment affirmed.*

CHEMUNG CANAL BANK *v.* LOWERY.

1. The English rule, that the Statute of Limitations cannot be set up by demurrer in actions at law, does not prevail in the courts of the United States sitting in Wisconsin.
2. The distinction between actions at law and suits in equity has been abolished by the code of that State; and the objection that suit was not brought within the time limited therefor, if the lapse of time appears in the complaint without any statement to rebut its effect, may be made by way of demurrer, if the point is thereby specially taken. If the plaintiff relies on a subsequent promise, or on a payment to revive the cause of action, he must set it up in his original complaint, or ask leave to amend.
3. A provision to the effect, that, when the defendant is out of the State, the Statute of Limitations shall not run against the plaintiff, if the latter resides in the State, but shall if he resides out of the State, is not repugnant to the second section of the fourth article of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

It appears by the complaint in this cause, that the plaintiff recovered a judgment against the defendants in New York, on the fourteenth day of June, 1862, for upwards of $15,000, — the plaintiff being a corporation of New York, and the defendants all having appeared in the suit. The present suit was brought on that judgment; but only one of the defendants was served with process, the others residing out of the jurisdiction of the court. The complaint states that the defendant, who was served with process, was when served, and still is, a citizen and resident of Wisconsin, but that he did not come into the State, and was not a resident thereof, until the year 1864. This action was commenced on the 24th of January, 1873, — a little more than ten years after the recovery of the judgment in New York, and less than ten years after the defendant, who was served, came into the State. The plaintiff demands judgment against the defendant now before the court.

The defendant filed the following demurrer to the complaint, to wit: —

"The defendant, Goodwin Lowery, demurs to the plaintiff's complaint in this action, for that it appears upon the face of the same that the plaintiff's claim or demand is barred by the Statute of Limitations, in that it appears that the supposed cause or causes of action did not, nor did either of them, accrue to the said plaintiff at any time within six years, nor at any time within ten years next before the commencement of this action, and for that the said complaint does not state facts sufficient to constitute a cause of action."

Upon this demurrer the court gave judgment for the defendant. To reverse this judgment, the present writ of error was brought.

Argued by *Mr. William P. Lynde* for the plaintiff in error.

Under the statute of Wisconsin, objection that the action was not commenced within the term limited can only be taken by answer. Rev. Stat. Wis., c. 138, sect. 1. Where the common-law pleadings prevail, a party seeking to avail himself of the Statute of Limitations must plead it specially. *Bricket* v. *Davis*, 21 Pick. 404; *Gould* v. *Johnson*, 2 Ld. Raym. 838;

Puckel v. *Moore*, 3 Vent. 191; *Jackson* v. *Varick*, 2 Wend. 294; *Robins* v. *Harvey*, 5 Conn. 335.

As the plaintiff might have been within some of the various exceptions mentioned by statute, the demurrer should have been overruled. Angell on Lim., c. 26, sect. 1; *State* v. *Finch*, Cro. Car. 381; *Hawkins* v. *Billhead*, id. 404; *Hyde* v. *Van Valkenburgh*, 1 Daly (N. Y.), 416.

The statute on which the defence is founded denies to citizens of other States the rights and immunities which it accords to her own, and is, therefore, in violation of the Constitution of the United States. *Corfield* v. *Coryell*, 4 Wash. C. C. 381; *Ward* v. *Maryland*, 12 Wall. 430; *Slaughter-house Cases*, 16 id. 117; Cooley on Const. Lim. 16; id. 397.

Mr. S. U. Pinney, contra.

The distinction between actions at law and suits in equity has been abolished in Wisconsin. Rev. Stat. Wis., c. 122, sect. 8. Therefore, where the defence of the Statute of Limitations is apparent on the face of the complaint, the objection that the demand is barred by lapse of time may be taken by demurrer. *Howell* v. *Howell*, 15 Wis. 55.

Such being the practice in the State courts, those of the United States sitting in that State are bound to adopt it. 17 Stat. 197.

The plaintiff in error is not a *citizen* within the meaning of that word, but a corporation of another State. It therefore has no *status* or standing in the courts of Wisconsin to enable it to invoke the protection of the Constitution of the United States. *Warren Manuf. Co.* v. *Ætna Insurance Co.*, 2 Paine, C. C. 516; *Paul* v. *Virginia*, 8 Wall. 168; *Bank of Augusta* v. *Earl*, 13 Pet. 586.

It is submitted that the statute of which plaintiff in error complains does not abridge or deny the privileges or immunities of citizens of other States within the meaning of the Constitution, but is a mere regulation of the remedies which the State, by virtue of its sovereignty and according to its own notions of policy, may constitutionally adopt.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The errors assigned in this case are substantially two: *First*, that the Statute of Limitations cannot be set up by demurrer;

and, *secondly*, that the statute on which the defence is founded is unconstitutional in this, that it unjustly discriminates in favor of the citizens of Wisconsin against the citizens of other States; for, if the plaintiff had been a citizen of Wisconsin, instead of a citizen of New York, the statute would not have applied.

As to the first assignment, it is undoubtedly true, that the Statute of Limitations cannot, by the English practice, be set up by demurrer in actions at law, though it may be in certain cases in suits in equity. And this rule obtains wherever the English practice prevails. But where the forms of proceeding have been so much altered as they have been in Wisconsin, further inquiry must be made. In the first place, by the Revised Statutes of that State, passed in 1858, in the title "Of proceedings in civil actions," it is declared that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." Rev. Stat. 714. Secondly, that "all the forms of pleading heretofore existing are abolished." The act proceeds to declare that the first pleading on the part of the plaintiff is the complaint, which shall contain, amongst other things, "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." Rev. Stat. 721. It provides that the defendant may demur for certain causes, but that other defences must be taken by answer. Id. Amongst the grounds of demurrer, one is, "that the complaint does not state facts sufficient to constitute a cause of action." In another title, — "Of the limitation of actions," — it is provided that "the objection that the action was not commenced within the time limited can only be taken by answer." Rev. Stat. 819. But the Supreme Court of Wisconsin has decided, that, when on the face of the complaint itself it appears that the statutory time has run before the commencement of the action, the defence may be taken by demurrer, which, for that purpose, is a sufficient answer. *Howell* v. *Howell*, 15 Wis. 55. This case has been recognized in later cases (see *Tarbox* v. *Supervisors*,

34 Wis. 561), and must be regarded as expressing the law of the State. On the first hearing of the case of *Howell* v. *Howell*, some importance was attached to the fact that it was an equity case, in which class of cases a demurrer has been allowed for setting up the Statute of Limitations; but, on a rehearing, a more enlarged view was taken, and a demurrer was regarded as sufficient in all cases where the lapse of time appears in the complaint without any statement to rebut its effect, and where the point is specially taken by the demurrer. If the plaintiff relies on a subsequent promise, or on a payment, to revive the cause of action, he must set it up in the original complaint, or ask leave to amend. Without this precaution, the complaint is defective in not stating, as required by the statute, facts sufficient to constitute a cause of action. But, although defective, advantage cannot be taken of the defect on motion, or in any other way than by answer; which answer, however, as we have seen, may be a demurrer.

As this is the law of Wisconsin, the Circuit Court of the United States for the Western District of Wisconsin is bound by it; and, as the decision in the principal case accords therewith, the first assignment of error cannot be sustained.

The other assignment calls in question the constitutionality of the Statute of Limitations itself. The statute having prescribed the time within which various actions must be brought, — amongst others, that "an action upon a judgment or decree of any court of record of any State or Territory of the United States, or of any court of the United States," must be brought within ten years, — it declares, that "if, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of said person into this State. But the foregoing provision shall not apply to any case, where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue are residents of this State." Rev. Stat. Wis. 822. This statute may be expressed shortly thus: When the defendant is out of the State, the Statute of Limitations shall not run against the plaintiff, if the latter resides in the State, but shall, if he resides out of the State. The argument of the plaintiff is, that, as the law refuses

to non-residents of the State an exemption from its provisions, which is accorded to residents, it is repugnant to that clause of the Constitution of the United States (art. 4, sect. 2) which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It is contended, that, if the resident creditors of the State may sue their non-resident debtors, at any time within six or ten years after they return to the State, non-resident creditors ought to have the same privilege; or else an unjust and unconstitutional discrimination is made against them. This seems, at first view, somewhat plausible; but we do not regard the argument as a sound one. There is, in fact, a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin, — it may be only in a railroad train, — a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust. *Beardsley* v. *Southmayd*, 3 N. J. L. (Green) 171.

It is also to be considered, that a personal obligation is due at the domicile of the obligee. It is the duty of the debtor to seek the creditor, and pay him his debt, at the residence of the latter. Not doing this, he is guilty of laches against the law of the creditor's domicile, as well as his own. But he evades this law by absenting himself from the jurisdiction. As long as he does this, the Statute of Limitations of that jurisdiction ought not to run to the creditor's prejudice. This cannot be said with regard to the non-resident creditor. It is not the laws of Wisconsin any more than those of China which his non-resident debtor contemns by non-payment of the debt, and absence from the State: it is the laws of some other State. Therefore, there is no reason why the Statute of Limitations of Wisconsin should not run as against the non-resident creditor; at least, there is not the same reason which exists in the case of the resident creditor. If the non-resident creditor wishes to keep his action

alive in other States than his own, he must reduce it to judgment, and revive that judgment from time to time. Each new judgment would create a new cause of action, and would prevent the operation of Statutes of Limitation of other States.

We are of opinion, therefore, that the law in question does not produce any unconstitutional discrimination; and we prefer putting the case upon this broad ground, rather than to examine into the rights of the plaintiffs as a foreign corporation doing business in Wisconsin. *Judgment affirmed.*

MR. JUSTICE STRONG concurred in the judgment of the court, but dissented from its opinion upon the second assignment of error.

RYAN ET AL. v. CARTER ET AL.

1. The first section of the act of June 13, 1812 (2 Stat. 748), making further provision for settling the claims to land in the Territory of Missouri, confirms, *proprio vigore*, the rights, titles, and claims to the lands embraced by it, and, to all intents and purposes, operates as a grant.
2. The court adheres to the doctrine, announced in its previous decisions, that a confirmatory statute passes a title as effectually as if it in terms contained a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to law.
3. Said first section is not, by the proviso thereto annexed, excluded from operating on the right and claim of an inhabitant of a village which is therein named to an out-lot, whose title thereto had, on his petition, been recognized and confirmed by the board of commissioners for adjusting and settling claims to land in said Territory.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action of ejectment, brought Aug. 27, 1873, for part of a tract of land known as Survey 422, situate in the county of St. Louis, Mo. The parties claimed title under Auguste Dodier, and defendants relied also on the Statute of Limitations.

On the 13th of October, 1800, Dodier asked of the then Spanish Lieutenant-Governor of Upper Louisiana a concession of five hundred arpens of land; and, on the 14th of that month, the Lieutenant-Governor ordered that he should be put in posses-

sion of the land requested. A survey and plat of the land so ceded was made by Soulard, surveyor under the Spanish government, and certified by him Dec. 10, 1800, and recorded by him in the record-book of surveys. Dodier duly filed and presented his claim to the board of commissioners for adjusting land-titles in the District of Orleans, Territory of Louisiana, who, on the thirty-first day of July, 1810, issued to him the following certificate: —

Commissioners' Certificate, No. 422, *July* 31, 1810.

"We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the Territory of Louisiana, have decided that Auguste Dodier, original claimant, is entitled to a patent under the provisions of the second section of an act of the Congress of the United States, entitled 'An Act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the District of Louisiana,' passed the second day of March, 1805, for five hundred arpens of land, situate in the District of St. Louis, on Beaver Pond, as described in a plat of survey, certified the 10th of December, 1800, and to be found of record in book A, page 326, of the recorder's office, by virtue of a permission from the proper Spanish officer, and also of actual inhabitation and cultivation prior to and on the twentieth day of December, 1803."

"JAMES B. C. LUCAS,
CLEMENT B. PENROSE,
FREDERICK BATES."

The land so confirmed was surveyed in 1817, by the proper surveyor of the United States, and is known as United States Survey No. 422; but the patent reciting the confirmation and survey was not issued until Aug. 9, 1873.

Dodier died in 1823, leaving heirs-at-law, under whom the plaintiffs claim title. Dodier and wife conveyed a part of the land by deed, bearing date Jan. 18, 1805, to Louis Labeaume, who died in 1821, having devised the property to his wife, by will made in 1817; and by mesne conveyances her title passed to the defendant Carter. He, and those under whom he claims, have been in the open, notorious, and undisputed possession of the demanded premises for thirty-five years before the commencement of this suit. In 1818, on the petition of Labeaume, partition was made between him and the heirs of Dodier; but

the land in controversy is not within the boundaries of the tract described in the report of the commissioners in said partition suit to be set off to Labeaume.

In the year 1822, Susan Labeaume brought an action of trespass *quare clausum fregit* against Dodier's heirs, in the Circuit Court of St. Louis County, to which was pleaded the general issue, and *liberum tenementum;* whereupon the plaintiff replied to second plea by novel assignment (describing the close as in the report of commissioners in the above partition suit). On July 27, 1825, the defendants in said suit obtained a verdict and a judgment thereon, and the case was taken by writ of error to the Supreme Court of the State of Missouri, by which, on May 25, 1826, the judgment was reversed and the case remanded, and on May 8, 1827, defendants again obtained judgment in the said Circuit Court. From the record of the said Supreme Court in said cause, it appears that a transcript of the record of said partition suit of *Louis Labeaume* v. *Dodier's Heirs*, was read in evidence, but that the notice to defendants in said partition suit was not included in the bill of exceptions, and was not before the Supreme Court, and that the conveyance from Auguste Dodier and wife to Louis Labeaume, being admitted by defendants in said trespass suit, was also read upon the trial of said cause, and a copy thereof preserved in the bill of exceptions taken and filed in said cause.

Prior to and on Dec. 20, 1803, Auguste Dodier was an inhabitant of the village of St. Louis, possessed and cultivated the land known as United States Survey No. 422, and had a right, title, and claim thereto. It was an out-lot of the said village, within the meaning of the act of June 13, 1812, with definite boundaries and location, prior to and at the date of the acquisition of Louisiana by the United States.

These are the material facts found by the court below, which, by written stipulation of the parties, made a special finding of the facts.

The court gave judgment for the defendants; whereupon the plaintiffs sued out this writ of error.

Argued by *Mr. Daniel T. Jewett* for the plaintiffs in error, who cited *Magwire* v. *Tyler*, 8 Wall. 650; *Gibson* v. *Chouteau*, 13 id. 92; *Guitard* v. *Stoddard*, 16 How. 494; *Clarke* v. *Hum-*

merle, 36 Mo. 620; *Glasgow* v. *Hortiz*, 1 Black, 600; *Strother* v. *Lucas*, 12 Pet. 410.

Mr. Montgomery Blair, *contra*.

MR. JUSTICE DAVIS delivered the opinion of the court.

The defendants, and those under whom they claim, have been in continuous and adverse possession of the land in controversy, claiming title to it for more than thirty-five years. The *justice* of the case, growing out of such length of possession, is manifestly with the court below; and we think the *law* of it is equally so.

The property in suit is part of a tract of land known as Survey 422, in the county of St. Louis. The court below, by stipulation, tried the case, and made a special finding of facts, on which it based its conclusion of law, that the plaintiffs could not recover. It is objected that some of these facts were not warranted by the evidence; but this is not a subject of inquiry here. If the parties chose to adopt this mode of trial, they are concluded by the propositions of fact which the evidence, in the opinion of that court, establishes. Whether general or special, the finding has the same effect as the verdict of a jury; and its sufficiency to sustain the judgment is the only matter for review in this court. *Norris* v. *Jackson*, 9 Wall. 125; *Flanders* v. *Tweed*, id. 425; *Kearney* v. *Case*, 12 id. 275; *Miller* v. *Life Ins. Co.*, id. 285.

Both parties claim under Auguste Dodier, to whom the tract was confirmed in 1810, by the board of commissioners created to settle the title to lands in the Territories of Orleans and Louisiana. The plaintiffs insist that this confirmation vested only an equitable title, and that the Statute of Limitations did not begin to run until the fee passed out of the United States by patent, in 1873. On the other hand, the defendants contend that the fee passed directly to him in 1812, by operation of the act of June 13 of that year (2 Stat. 748); and, if so, it is conceded that the Statute of Limitations gives them title. It becomes necessary, therefore, to inquire how far the acts of Congress to protect the rights of property in the territory acquired from France by the treaty of April 30, 1803, apply to and affect the title to the land in controversy.

The United States stipulated that the inhabitants of the ceded country should be protected in the free enjoyment of their property; and in discharge of this obligation, and with a view to ascertain and adjust their claims to land, Congress passed acts in 1805, 1806, and 1807. As the board progressed in its investigations, it was found that the enforcement of the rules prescribed for its guidance excluded from confirmation a large number of meritorious claims, and more liberal provision was made for them by the act of June 13, 1812. Its first section declares "that the rights, titles, and claims to town or village lots, out-lots, common field-lots, and commons in, adjoining, and belonging to the several towns and villages (naming them), in the Territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the twentieth day of December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights of common thereto, provided that nothing herein contained shall be construed to affect the rights of any person claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to lands in the said Territory." It does not require the production of proofs before any commission or other tribunal established for that special purpose, but confirms, *proprio vigore*, the rights, titles, and claims to the lands embraced by it, and operates as a grant, to all intents and purposes. Repeated decisions of this court have declared that such a statute passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law, as well as by a patent pursuant to a law.

The court below found that the lot of ground, now known as Survey 422, was an "out-lot" of the village of St. Louis, with definite boundaries and location, prior to and at the date of the acquisition of Louisiana by the United States, and that Dodier was in possession of it, and an inhabitant of the village. It follows that the confirmation became complete, and vested in him a legal title, valid against the United States, and all persons claiming under it by a subsequent patent, unless his case

was taken out of the enacting clause by the proviso that the act shall not *affect* any confirmed claims to the same lands. How "affect" them? If in the sense of simply acting upon them, then his title is excepted from the operation of the act. But this exception is not within the reason of the proviso, and the court is at liberty to adopt another construction, if it may be fairly done, by giving full and just effect to the words used.

The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it, as being within the words as well as the reason thereof. *United States* v. *Dickson*, 15 Pet. 165. Why should Congress wish to exclude Dodier's title, if it did not conflict with any other, and was embraced by the general words of the statute? If it was left incomplete by the act of 1807, and completed by the act of 1812, there was certainly no reason for excluding it. It was within the power of Congress to favor the inhabitants of villages over other claimants; and the fact that he had documentary evidence of his title to this out-lot, which the commissioners recognized and approved, affords no ground for supposing that Congress meant to deprive him of the benefit of another law dispensing with this evidence, and still meeting the requirements of his case. This would lead to unjust consequences; for it would discriminate between villagers, and put claims, supported by paper-title with possession, on a less favored footing than those resting only on cultivation and possession. Besides, such a purpose is inconsistent with the avowed object of the law, which is to confirm to the villagers, without discriminating in favor of any class, their rights of property, whether held in severalty or in common. If Congress had intended to exclude confirmed claims, the fair presumption is, that it would have, in terms, excepted them, or by some form of words declared their exclusion. But common fairness required that successful claimants before the board of commissioners should, in any event, be protected, and that the general words of the law should be so limited as not to produce a conflict of title. It would have been wrong, in legislating for the inhabitants of ancient villages, to do any thing prejudicial to those who, having been invited to present their claims to the

board, had obtained its approval of them. This was recognized by Congress; and, to guard against the possibility of conflict, the proviso was inserted. No known rule of law requires us to interpret it according to its literal import, when its evident intent is different. It may be that the words, taken in their usual sense, would exclude the case of Dodier; but if it can be gathered, from a view of the whole law, and others *in pari materia*, that they were not used in that sense, and if they admit of another meaning in perfect harmony with the general scope of the statute, it will be adopted as the declaration of the will of Congress. Especially is this so when this construction withdraws the least number of cases from the operation of the statute. It is unnecessary to give the various definitions of the word "affect." It is enough to say, that it is often used in the sense of acting injuriously upon persons and things; and in this sense, we are all of opinion, it was used in this proviso. This interpretation accords with the reason and manifest intent of the proviso. It unsettles no confirmed title, and secures to the inhabitants of the villages, according to their respective rights, the protection which Congress in its wisdom thought proper to afford them.

If there were any doubt remaining about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is *in pari materia*. The various laws, from time to time passed respecting the claims to lands in the Territories of Orleans and Louisiana, were modified as policy required; but they constitute a land system, are all *in pari materia*, and, in explaining their meaning and import, are to be regarded as one statute. *Patterson* v. *Winn*, 11 Wheat. 336. The third section of the act of 1807 (2 Stat. 440) confirms the claim of the corporation of the city of New Orleans to the commons adjacent to the city, and provides, that "nothing herein contained shall be construed to *affect or impair* the rights of any individual or individuals to the said commons which are derived from any grant of the French or Spanish governments." The word "impair" is dropped from the proviso in the act of 1812, doubtless because it was deemed superfluous and unnecessary. There was no reason why the different provisos should have different limitations. Both had a common

object, — to protect individual rights and prevent conflict of titles. The grants of the New Orleans commons, in the one case, and of the village lots in the other, were simply on the condition that no adverse claimant should be injured by them. If it should turn out that any one was benefited by the grant, he was not barred from availing himself of it because he had given another title in evidence before a regularly constituted board of commissioners.

Strother v. *Lucas*, 12 Pet. 410, is cited by the plaintiffs as an authority in this case; but it can hardly be considered in that light. It is true that the court treat Lucas's title as "being a grant by the United States, under the confirmation of the commissioners and the act of 1812;" but the effect which that act has on a lot confirmed by the commissioners was not discussed at the bar, or considered in the opinion, nor has it, to our knowledge, been heretofore decided by this court.

It is claimed that the effect of the partition suit is to estop the defendants from setting up title to lands which were not assigned to Labeaume by the commissioners in partition. But the lines of partition were incorrect; for the court finds that the land in controversy is a part of that conveyed to Labeaume by deed from Dodier, and is not within the boundaries of the land set off to him. Besides, neither party recognized the proceedings in partition as binding; nor were they at all necessary, as the deed calls for the whole estate in a specified part of a tract of land. In such a case, the deed ought to and must control the rights of the parties.

It is unnecessary to notice any other assignments of error, for these views dispose of the whole case, and affirm the judgment of the Circuit Court. *Judgment affirmed.*

KITCHEN *v.* RANDOLPH.

Unless an appeal is perfected, or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of, it is not within the power of a justice of this court to allow a *supersedeas*.

ON motion to vacate a *supersedeas*.

This is a motion by the appellee to vacate and set aside an order made by an associate justice of this court, granting the petition of the appellant for a *supersedeas* directing a stay of all proceedings, under a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, foreclosing a mortgage on property of the Wilmington and Reading Railroad Company, and ordering a sale of the same.

The bill for the foreclosure and sale was filed by Randolph, as holder of coupon-bonds of that company, secured by a certain deed of trust and mortgage against the company, the trustees named in the deed and two other junior mortgages, and the Baltimore, Philadelphia, and New York Railroad Company, as original defendants.

Subsequently, Kitchen, a bondholder under a junior mortgage of the Wilmington and Reading Railroad Company, was allowed to intervene as a defendant and file an answer.

The case was heard on the bill, the answers of the original defendants, and that of Kitchen; and, on the 6th of June, 1876, the court below entered a decree foreclosing the mortgage as against certain of the property and franchises covered by it, and ordering a sale by the trustees, after due advertisements for three months prior to the day of sale.

The sale was accordingly fixed by due advertisements, as prescribed by the decree, for the 2d of October, 1876.

No appeal from this decree, or any part of it, was prayed in the court below by any of the defendants; but, on the 29th of September, 1876, the appellant filed his petition for the allowance of an appeal and for a *supersedeas*, both of which were allowed on that day by the associate justice, and a citation addressed to the complainant below, returnable on the first day of the present term of this court, was issued.

The motion was argued by *Mr. J. Hubley Ashton* for the appellee, and by *Mr. Samuel Dickson* and *Mr. Wayne MacVeagh* for the appellant.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only question presented by this motion is as to the power of a justice of this court to allow a *supersedeas* in cases where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of.

The Judiciary Act of 1789 (1 Stat. 84, sect. 22) made provision for a review by this court of judgments and decrees in civil actions and suits in equity in the circuit courts upon writs of error accompanied by a citation to the adverse party, "signed by a judge of such circuit court or justice of the Supreme Court." By the same section it was further provided, that "every justice or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

The citation was essential to the validity of the writ, and without it the writ would be quashed. *Lloyd* v. *Alexander*, 1 Cranch, 365. The writ brought up the record, and the citation the parties. *Cohens* v. *Virginia*, 6 Wheat. 410; *Atherton* v. *Fowler*, 91 U. S. 146. As the security was to be given when the citation was signed, there could be no valid writ without the security.

At common law, a writ of error was a *supersedeas* by implication. Bac. Abr., tit. *Supersedeas*, D, 4. To avoid the effect of this rule, the act of 1789 (1 Stat. 85, sect. 23) provided that a writ of error "shall be a *supersedeas*, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of;" and in cases where a writ of error might be a *supersedeas* no execution could issue for ten days.

Under this section it was held, in *Hogan* v. *Ross*, 11 How. 297, that there was no authority "to award a *supersedeas* to stay proceedings on the judgment of an inferior court upon the ground that a writ of error is pending, unless the writ was sued out within ten days after judgment and in conformity with the provisions of the" act; and in *Railroad Co.* v. *Harris*, 7 Wall. 575, that the effect of the writ as a *supersedeas* "depends upon compliance with the conditions imposed by the act," and that "we cannot dispense with that compliance in respect to lodging a copy for the adverse party."

The stay of proceedings followed as a matter of right from the issue and service of the writ of error, in the manner and within the time prescribed by the act. No special directions as to the security were necessary, because, under the law as it originally stood, security must be given in all cases when the writ was issued, that the plaintiff in error would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. It soon became manifest, however, that, in cases where there was to be no *supersedeas*, security to this extent was unnecessary; and, consequently, in 1794, it was enacted (1 Stat. 404) "that the security to be required and taken on the signing of a citation on any writ of error, which shall not be a *supersedeas* and stay execution, shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error." After this the form of the security became material, and the *supersedeas* was made to depend upon the condition of the bond executed at the time of the signing of the citation, as well as upon the prompt issue and service of the writ. *Rubber Co.* v. *Goodyear*, 6 Wall. 156; *Slaughter-house Cases*, 10 Wall. 289, 291.

In 1803 appeals were granted in cases of equity and of admiralty and maritime jurisdiction, and made "subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error." 2 Stat. 244, sect. 2. It has accordingly been held that an appeal to operate as a *supersedeas* must be perfected and the security given within ten days after the rendition of the decree. *Adams* v. *Law*, 16 How. 148; *Hudg-*

kins v. *Kemp*, 18 id. 535; *French* v. *Shoemaker*, 12 Wall. 100; *Bigler* v. *Walker*, id. 149. The allowance of the appeal is the equivalent of the writ of error.

It thus appears that, under the statutes which regulated the early practice, a *supersedeas* could not be obtained except by prompt action and strict compliance with all the requirements of the law. Parties were, however, not unfrequently put to serious inconvenience by so stringent a rule; and, to avoid this, it was enacted in 1872 (17 Stat. 198, sect. 11) "that any party or person desiring to have any judgment, decree, or order of any district or circuit court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree, or order, or afterward, with the permission of a justice or judge of the appellate court." In *Telegraph Company* v. *Eyser*, 19 Wall. 419, we held, in reference to this statute, that where an appeal was taken and the requisite security given after the expiration of ten days, but within sixty, a *supersedeas* followed as a matter of right. In the course of the opinion in that case it was said: "It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. . . . The execution, approval, and filing of the bond are substantial. The filing of the writ is matter of form." In *Board of Commissioners* v. *Gorman*, 19 Wall. 661, decided at the same term, we further held, that execution might issue after the expiration of ten days, if a *supersedeas* had not been obtained; but, if one should issue, and a *supersedeas* be thereafter perfected, that would only operate to stay further proceedings under the execution, and could not interfere with what had already been done.

In this condition of the law the Revised Statutes were adopted, and sect. 1007 is as follows: —

"In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, execution shall not issue until the expiration of the said term of sixty days."

At the next session of Congress, an amendment to this section was passed, limiting the time for withholding execution to ten days. 18 Stat. 318. By sect. 1012, Rev. Stat., that part of the act of 1803 (2 Stat. 244) which placed appeals on the same footing as writs of error was re-enacted, and, by sect. 1000, provision was made for security for costs only in cases where no *supersedeas* was desired, thus reproducing the old law on that subject.

It is evident that Congress intended in this revision to change to some extent the law of 1872. The fair inference from the opinion in *Telegraph Company* v. *Eyser*, is, that as that law "was silent as to the writ," and "it was not said when it must be served," a *supersedeas* could be obtained by the execution, approval, and filing of the necessary security, even though the writ of error should not be served or the appeal taken until after the expiration of sixty days. In this way the old rule requiring promptness of action to obtain a stay of proceedings was substantially abandoned. A justice or judge could, in his discretion, grant the stay at any time, if the writ should be issued and served within the two years allowed for that purpose.

The revised section is *not* "silent as to the writ," and it *is* "said when it must be served." If a *supersedeas* is asked for when the writ is obtained, the writ must be sued out and served within the sixty days, and the requisite bond executed when the

citation is signed. The policy of the old law is thus restored, the only modification being in the extension of time allowed for action. Sixty days are given instead of ten.

Had the section stopped here, a plaintiff in error or appellant would have been compelled to elect, when he sued out his writ of error, or took his appeal, whether he would have a *supersedeas* or not; because it is made one of the conditions of the stay of proceedings that the requisite security shall be given upon the issuing of the citation. Having once made his election, he would be concluded by what he had done. But Congress, foreseeing undoubtedly that cases might arise in which serious loss would result from such a rule, went further, and, in a subsequent part of the section, provided, that if a writ of error had been served, as required in the first paragraph, a stay might be had as a matter of right by giving the required security within sixty days, and afterwards, as a matter of favor, if permission could be obtained from the designated justice or judge. Thus prompt action in respect to the writ was required, and indulgence granted only as to the security.

It is contended, however, that the words "having served his writ of error as aforesaid," as used in this part of the section, have reference to the manner of service alone; that is to say, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, and not to the time, sixty days. But time is one of the necessary ingredients in the prescribed service to secure a *supersedeas* under the provisions of the first part of the section. It cannot be dispensed with there any more than it could have been under the act of 1789; and under that act, as has been seen, it was essential. In fact, it was the one thing upon which, more than all others, the relief sought for depended. Service "as aforesaid" must, therefore, mean such a service as would have perfected the stay, if the proper security had been given. Relief is extended only in respect to the security.

What afterwards occurred is equally indicative of the intention of Congress. As the section originally stood, no execution could issue, when the writ of error might be a *supersedeas* until the expiration of sixty days, the time allowed for perfecting a *supersedeas* without leave. If the writ had been issued and served without the security required for a *supersedeas*,

execution must still be withheld until the time had elapsed within which the further security might be given as a matter of right. This changed the law from what we held it to be in *Commissioners* v. *Gorman*, and at once, upon the discovery of the effect of what had been done, the amendment was adopted limiting the time to ten days, as it originally stood. Nothing was done, however, towards adapting the section as revised to the liberal construction of the act of 1872, indicated in *Telegraph Company* v. *Eyser*.

We are, therefore, of the opinion, that, under the law as it now stands, the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done.

The appeal was taken in this case after the expiration of sixty days, and the motion to vacate the *supersedeas* must for that reason be granted. *Motion granted.*

DRESSER v. MISSOURI AND IOWA RAILWAY CONSTRUCTION COMPANY.

A *bona fide* holder of negotiable paper, purchased before its maturity upon an unexecuted contract, on which part payment only had been made when he received notice of fraud, and a prohibition to pay, is protected only to the amount paid before the receipt of such notice.

ERROR to the Circuit Court of the United States for the District of Iowa.

Submitted on printed arguments by *Mr. James Grant* for the plaintiff in error, and by *Mr. George G. Wright, contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought upon three several promissory notes made by the Missouri and Iowa Railway Construction Company, dated Nov. 1, 1872, payable at two, three, and four months, to the order of William Irwin, for the aggregate amount of $10,000.

The defence is made that they were obtained by his fraudulent representations.

But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is *bona fide*, the question is as to the amount of his recovery.

Under the ruling of the court he recovered $500. His contestation is, that he is entitled to recover the face of the note, with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury, that if they believed, from the evidence, that the plaintiff purchased the notes in controversy of William Irwin for a valuable consideration, on the 1st of November, 1872, and paid $500, part of the consideration, on 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount of the notes; and the court refused this instruction. But the court charged the jury, —

"That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged; and that if the defendants failed to satisfy the jury of that fact, the whole defence fails.

"That if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid $500 upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto;* that is, to the amount paid before he received notice."

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might by its transfer subject him to liability. His agreement seems to have been an oral one merely, — to pay the amount agreed upon, as should be required; and he had paid $500, and no more, when notice of the fraud was brought home to him.

The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes in suit for $500, before maturity

and without notice of any defence, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them. *Fowler* v. *Strickland*, 107 Mass. 552; *Park Bank* v. *Watson*, 42 N. Y. 490; *Bank of Michigan* v. *Green*, 33 Iowa, 140. The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which $500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts generally. In the case of the sale of real estate for a sum payable in instalments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards. *Barnard* v. *Campbell*, 53 N. Y. 73; *Lewis* v. *Bradford*, 10 Watts, 82; *Juvenal* v. *Jackson*, 2 Harris, 529; id. 430; *Youst* v. *Martin*, 3 S. & R. 423, 430.

In *Weaver* v. *Barden*, 49 N. Y. 291, the court use this language: "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid. Where a man purchases an estate, pays part and gives bonds for the residue, notice of an equitable incumbrance before payment of the money, though after giving the bond, is sufficient. *Touville* v. *Naish*, 3 P. Wms. 306; *Story* v. *Lord Windsor*, 2 Atk. 630. Mere security to pay the purchase price is not a purchase for a valuable consideration. *Hardingham* v. *Nicholls*, 3 Atk. 304; *Maundrell* v. *Maundrell*, 10 Ves. 246, 271; *Jackson* v. *Cadwell*,

1 Cowen, 622; *Jewell* v. *Palmer*, 7 J. C. 65. The decisions are placed upon the ground, according to Lord Hardwicke, that if the money is not actually paid the purchaser is not hurt. He can be released from his bond in equity."

The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no farther.

Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us required such refusal by him. Authorities *supra*.

Crandell v. *Vickery*, 45 Barb. 156, is in point. Holdridge had obtained the indorsement by Vickery of his (Holdridge's) notes by false and fraudulent representations. These notes were transferred to Crandell without notice or knowledge of the fraud, he giving to Holdridge several checks for the amount, upon the understanding that they were not to be presented for payment, but when the money was wanted, he was to give new checks as needed. Before giving the new checks, plaintiff was informed of the fraud, and requested not to make payment, or to give his checks. He did, however, give his new checks, according to the original agreement, and brought suit upon the notes against Vickery, the indorser.

It was held that he was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud; that he had then parted with no value; that the real obligations were given afterwards, and under circumstances that afforded no protection.

That case is stronger for the holder than the one before us, in the fact that checks were there given on the original transaction, which might have been presented or passed off to the prejudice of the maker; while here the transaction was oral throughout.

To the same purport in principle, although upon facts somewhat different, are the cases of *Garland* v. *The Salem Bank*, 9 Mass. 408, *The Fulton Bank* v. *The Phœnix Bank*, 1 Hall, 562, and *White* v. *Springfield Bank*, 3 Sandf. S. C. 227.

The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without con-

sideration, as collateral security, he holds for the amount advanced upon it, and for that amount only. *Williams* v. *Smith*, 2 Hill, 301.

In *Allaire* v. *Hartshorn*, 1 Zabr. 663, the case was this: Hartshorn sued Allaire on a note of $1,500 at ninety days, made by Allaire. It was proved that the note had been misapplied by one Pettis, to whom it had been entrusted; that he had pledged it to the plaintiff as security for $750 borrowed of him on Hegeman's check, and also as security for a $400 acceptance of another party then given up to Pettis.

On the trial, the court charged the jury, that, if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the court of errors and appeals of the State of New Jersey, upon an exception to this charge. The court reversed the judgment, holding that, although a *bona fide* holder, Hartshorn could recover only the amount of his advances.

The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser.

No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing, It has our concurrence, and is affirmed.

BIRD ET AL., EXECUTORS, *v.* LOUISIANA STATE BANK.

1. A promissory note, bearing date Jan. 28, 1859, payable twelve months thereafter at the Citizens' Bank, New Orleans, and indorsed by A., the payee, and B., the then owner thereof, who resided in Missouri, was, before maturity, placed in the branch of the Louisiana State Bank at Baton Rouge, whose cashier indorsed and forwarded it to the mother bank at New Orleans for collection. It was duly protested for non-payment by the notary of the mother bank, who mailed notices of protest for the indorsers to the cashier of the branch bank. A., upon whom reliance was principally placed, died, and his executors were qualified before the maturity of the note; but neither they nor B. was served by the branch bank with notice of protest.

Held, that the bank was liable for any loss thereby sustained by the holder of the note.

2. As the Statute of Limitations was suspended in Louisiana during the war, the note was not prescribed when the plaintiffs, the executors of A., made a legal demand on the defendant by instituting this action, Jan. 5, 1870. The defendant, by paying the note at that time, could, therefore, have been subrogated to their rights, and could have maintained suit against the maker in their names.

ERROR to the Circuit Court of the United States for the District of Louisiana.

Submitted on printed arguments by *Mr. E. T. Merrick* and *Mr. G. W. Race* for the plaintiffs in error. Argued by *Mr. Thomas J. Durant, contra.*

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case was tried by the court below, a jury being waived. From the findings of fact, it appears that R. A. Stewart made a promissory note at New Orleans, on the 28th of January, 1859, payable to the order of H. Doyal, at twelve months after date, with interest, at the Citizens' Bank, New Orleans, and that said note was indorsed by Doyal. A. Bird, of Manchac, La., as the agent of John Bird, of St. Louis, Mo. (the testator of the plaintiffs), before the maturity of the note, indorsed it, and deposited it in the branch of the Louisiana State Bank, at Baton Rouge, for collection. W. S. Pike, the cashier of the said branch bank, indorsed the note, as cashier, before its maturity, and transmitted it for collection to the defendant, — the mother bank at New Orleans. When it became due, the defendant placed it in the hands of the notary, whom it usually employed in its own business, for demand of payment and protest; and said notary duly made demand, and protested the note for non-payment, and mailed notices for the indorsers to Pike, cashier of the branch bank at Baton Rouge. Doyal, the indorser, on whom reliance was principally placed, resided, when the note was made and indorsed, on a plantation at New River, in the parish of Ascension, which adjoins that of Baton Rouge; but he died two days afterwards, and executors of his will were immediately qualified. No notice of protest was served on them; and for this cause, in an action brought against them by the plaintiffs, they were held not liable. No suit was ever brought against the maker of the

note, he being wholly without credit, as to the payment of any debt when it became payable; and as to him the note is now prescribed. Neither the notary, nor any of the officers of the bank or branch, knew of Doyal's death when the note was protested, nor does it appear that it was known to the testator of the plaintiffs. This suit was brought to recover the amount of the note from the defendant, by reason of its alleged negligence in not giving notice to the executors of the indorser, Doyal, whereby the liability of his estate was lost. The court having found these facts, and some others which we do not deem material to the decision, gave judgment for the defendant; whereupon the plaintiffs brought this writ of error.

Without stopping to inquire whether the mother bank and its notary did their whole duty in reference to protesting the note, and giving notice to the indorsers, we think it manifest that the branch bank was delinquent, after receiving the notices from the notary, in not giving notice to Bird, and the executors of Doyal, or at least to Bird. Had the notices been sent to the latter, it would then have been his duty to notify the executors of Doyal; but the branch bank, so far as appears from the facts found in this case, did neither. The inclosing of notices by the notary to the branch was notice to it that he (the notary) had not served them on the prior indorsers. And as an agent, charged with the duty of collecting the note, and doing whatever was necessary to insure the liability of the indorsers if it was not paid, the branch was bound to give notice of its nonpayment, at least to its principal, in order that he might do what was requisite to protect himself. The neglect to do this rendered the branch bank liable to the plaintiffs' testator for the loss of the money; and it is conceded that the negligence of the branch bank is chargeable upon the defendant. They are one concern as to liability, though treated as separate establishments and distinct entities in the transaction of business.

The only remaining question is, whether the plaintiffs or their testator have, by their conduct or laches, released the defendant from liability. It is contended, that the holder of the note was bound to prosecute the maker, or to have prosecuted his claim against the defendant in time to enable it to do so, on being

subrogated to his rights; whereas, the plaintiffs have delayed this suit until all claim against the maker is lost by prescription; and that it is no answer to this defence to say that the maker was insolvent when the note became due, as he may have since become abundantly able to pay.

There is much plausibility in this position; but a careful examination of the dates shows that the note was not prescribed on the 5th of January, 1870, when the plaintiffs made a legal demand on the defendant by instituting this action. Less than ten years had then elapsed since the maturity of the note, and, deducting the period during which the war continued, according to the rule adopted in the case of *The Protector*, 12 Wall. 700, it will appear that the time of prescription of five years had not elapsed. The defendant, by paying the note at that time, could have been subrogated to the rights of the plaintiffs, and maintained suit against the maker in their names. The court below seems to have supposed that the time of trial was the point of time to which the estimate was to be made; but in this it was mistaken. The time of commencing the action was the proper point.

Judgment reversed, and record remanded, with directions to award a venire de novo.

SHERLOCK ET AL. v. ALLING, ADMINISTRATOR.

1. Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the State; and, as thus applied, it constitutes no encroachment upon the commercial power of Congress.
2. The action of Congress as to a regulation of commerce, or the liability for its infringement, is exclusive of State authority; but, until some action is taken by Congress, the legislation of a State, not directed against commerce or any of its regulations, but relating generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or inter-State commerce, or persons engaged in such commerce.
3. The act of March 30, 1852, "to provide for the better security of the lives of

passengers on board of vessels propelled in whole or part by steam, and for other purposes," does not exempt the owners and master of a steam-vessel, and the vessel, from liability for injuries caused by the negligence of its pilot or engineer, but makes them liable for all damages sustained by a passenger or his baggage, from any neglect to comply with the provisions of the law, no matter where the fault may lie; and, in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

4. The relation between the owner or master and pilot, as that of master and employé, is not changed by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors.

ERROR to the Supreme Court of the State of Indiana.

Argued by *Mr. T. D. Lincoln* for the plaintiffs in error, and by *Mr. C. A. Korbly* for the defendants in error.

MR. JUSTICE FIELD delivered the opinion of the court.

In December, 1858, the defendants were the owners of a line of steamers employed in navigating the river Ohio between the port and city of Cincinnati, in the State of Ohio, and the port and city of Louisville, in the State of Kentucky, for the purpose of carrying passengers, freight, and the United States mail. On the 4th of that month, at night, two boats of the line, designated, respectively, as the "United States" and the "America," collided at a point on the river opposite the mainland of the State of Indiana. By the collision, the hull of one of them was broken in, and a fire started, which burned the boat to the water's edge, destroying it, and causing the death of one of its passengers, by the name of Sappington, a citizen of Indiana. The administrator of the deceased brought the present action for his death in one of the courts of common pleas of Indiana, under a statute of that State, which provides, "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission."

The complaint in the action alleged that the collision occurred within the territorial jurisdiction of Indiana, above the line of low-water mark of the river, and charged it generally to the careless and negligent navigation of the steamboat "United

States," by the defendants' servants, and officers of the vessel, but especially to the carelessness of the pilot, in running the same at too great a speed down the stream; in giving the first signal to the approaching boat as to the choice of sides of the river contrary to the established custom of pilots navigating the Ohio, and the rules prescribed by the act of Congress; and in not slackening the speed of the boat and giving a signal of alarm and danger until it was too late to avoid the collision.

To defeat this action, the defendants relied upon substantially the following grounds of defence: 1st, that the injuries complained of occurred on the river Ohio, beyond low-water mark on the Indiana side, and within the limits of the State of Kentucky; and that, by a law of that State, an action for the death of a party from the carelessness of another could only be brought within one year from such death, which period had elapsed when the present action was brought; and, 2d, that at the time of the alleged injuries the colliding boats were engaged in carrying on inter-State commerce under the laws of the United States, and the defendants, as their owners, were not liable for injuries occurring in their navigation through the carelessness of their officers, except as prescribed by those laws; and that these did not cover the liability asserted by the plaintiff under the statute of Indiana.

Under the first head, no question is presented for consideration of which we can take cognizance. It is admitted that the territorial limits of Indiana extend to low-water mark on the north side of the river, and the jury found that the collision took place above that mark. It is, therefore, of no moment to the defendants that the Supreme Court of Indiana held that the State possessed concurrent jurisdiction with Kentucky on the river, under the act of the Commonwealth of Virginia of 1789, providing for the erection of the district of Kentucky into an independent State, and that the legislation of Indiana could, for that reason, be equally enforced with respect to any matters occurring on the river, as with respect to similar matters occurring within her territorial limits on the land.

The questions for our consideration arise under the second head of the defence. Under this head it is contended that the statute of Indiana creates a new liability, and could not, there-

fore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is, that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge Case*, 13 id. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot* v. *Davenport*, 22 id. 227, the statute of Alabama required the owner of a steamer navigating the waters of the State to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile County, a statement in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neg-

lecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the State in addition to those prescribed by Congress. And in all the other cases where legislation of a State has been held to be null for interfering with the commercial power of Congress, as in *Brown* v. *Maryland*, 12 Wheat. 425, *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton* v. *Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-State commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-State commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that

commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress. *United States* v. *Bevans*, 8 Wheat. 337.

In the case of *The Steamboat Company* v. *Chase*, reported in the 16th of Wallace, this court sustained an action for a marine

tort resulting in the death of the party injured, in the name of the administrator of the deceased, under a statute of Rhode Island, similar in its general features to the one of Indiana. There the deceased was killed whilst crossing Narraganset Bay in a sail-boat by collision with a steamer of the company; and though objections were taken, and elaborately argued, against the jurisdiction of the court, it was not even suggested that the right of action conferred by the statute, when applied to cases arising out of marine torts, in any way infringed upon the commercial power of Congress.

In addition to the objection urged to the statute of Indiana, the defendants also contended, that, as owners of the colliding vessels, they were exempt from liability to the deceased, as a passenger on one of them, and, of course, to his representatives, as the collision was caused, without any fault of theirs, by the negligence of the pilots; and they relied upon the thirtieth section of the act of Congress of March 30, 1852, to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam. That act was in force when the injuries complained of in this case were committed, and its principal features have been retained in subsequent legislation. The section provided, "that whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, *if it happens through any neglect to comply with the provisions of law herein prescribed*, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot, and recover damages for any such injury caused as aforesaid by any such engineer or pilot." 10 Stat. 72.

It was argued, that by this section Congress intended the exemption claimed. And confirmation of this view was found in the fact, that the owners were obliged to take a pilot, and were restricted in their choice to those licensed by the govern-

ment inspectors. It was supposed that the relation between owner and pilot, as that of master and employé, was thus changed, and that, with the change, the responsibility of the former for the negligence of the latter ceased. The court, however, proceeded through the trial upon a different theory of the position of the defendants. It held, that, as owners, they were responsible for the conduct of all the officers and employés of the vessels, and that it was immaterial whether the vessels were or not at the time of the collision under the exclusive charge of the pilots. The instructions to the jury, at least, went to that extent. They, in substance, declared that, if the collision occurred within the territorial jurisdiction of Indiana, and was caused, without fault of the deceased, by the carelessness or misconduct of the defendants, or any of their agents, servants, or employés, in navigating and managing the steamers, or either of them, the plaintiff was entitled to recover.

In support of the exemption, the counsel of the defendants called to our attention an opinion of the Supreme Court of Kentucky, in a similar case arising upon the same collision, where such exemption was upheld. The opinion is marked by the usual ability which characterizes the judgments of that court; but, after much hesitation and doubt, we have been compelled to dissent from its conclusions. The statute appears to us to declare, that the owners and master of a steam-vessel, and the vessel itself, shall be liable for all damages sustained by a passenger or his baggage, from any neglect to comply with the provisions of the law, no matter where the fault may lie; and that, in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The statute of England, which exempts the owners of vessels and the vessels from liability for faults of pilots, — pilotage there being compulsory, and pilots being licensed, — has not met with much commendation from the admiralty courts, and the general tendency of their adjudications has been to construe the exemption with great strictness. This course of decision is

very fully stated in the exposition of the law made by Mr. Justice Swayne, in the case of *The China*, 7 Wall. 53, where this court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of *The Halley*, Law Rep. 2 Adm. & Ecc. 15, decided as recently as 1867, Sir Robert Phillimore strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner; and observed, that no one acquainted with the working of the law could be ignorant that it was fruitful in injustice. The doctrine, that the owners are responsible for the acts of their agents and employés, ought not to be discarded; because the selection of a pilot by the owner is limited to those who, by the State, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to conduct a vessel through them. "As a general rule," says Mr. Justice Grier, "masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast" (and, we may add, with the currents and shoals of every river), "nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant, but are not in a situation to test or judge of his qualifications, and have not, therefore, the information necessary to choice. The pilot laws kindly interfere, and do that for the owners which they could not do for themselves." *Smith* v. *The Creole and The Sampson*, 2 Wall. Jr. 515. And the learned Justice observes, that in such cases, where a pilot is required to be taken from those licensed, the relation of master and servant is not changed; that the pilot continues the servant of the owners, acting in their employ, and receiving wages for services rendered to them, and that the fact that he is selected for them by persons more capable of judging of his qualifications cannot alter the relation.

And, in the case of *The Halley*, Sir Robert Phillimore upon this subject says: "I do not quite understand why, because the

State insists, on the one hand, upon all persons who exercise the office of pilot, within certain districts, being duly educated for the purpose, and having a certificate of their fitness, and insists, on the other hand, that the master shall, within these districts, take one of these persons on board to superintend the steering of his vessel, the usual relation of owner and servant is to be entirely at an end; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates."

By the common law, the owners are responsible for the damages committed by their vessel, without any reference to the particular agent by whose negligence the injury was committed. By the maritime law, the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law, the vessel is deemed to be an offending thing, and may be prosecuted, without any reference to the adjustment of responsibility between the owners and employés, for the negligence which resulted in the injury. Any departure from this liability of the owners or of the vessel, except as the liability of the former may be released by a surrender of the vessel, has been found in practice to work great injustice. The statute ought to be very clear, before we should conclude that any such departure was intended by Congress. The section we have cited would not justify such a conclusion. Its language readily admits of the construction we have given, and that construction is in harmony with the purposes of the act. *Judgment affirmed.*

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY v. LUCAS, TREASURER.

1. If by any direction of a Supreme Court of a State an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject in a proper case to review by this court. *So held*, where, upon appeal from an interlocutory order made by a circuit court of Indiana, granting a temporary injunction, the Supreme Court of the State reversed the order and remanded the cause to the lower court, with directions to dismiss the complaint.
2. Unless restrained by provisions of its constitution, the legislature of a State

possesses the power to direct a restitution to tax-payers of a county, or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in possession of the municipality. The exercise of this power infringes upon no provision of the Federal Constitution.

ERROR to the Supreme Court of the State of Indiana.

By an act of the legislature of Indiana, passed on the twelfth day of May, 1869, counties and townships in that State were authorized to aid in the construction of railroads, by taking stock in railroad companies, and making donations to them. Before giving the aid, it was necessary for the officers of the county, the board of commissioners, to consult the electors of the county upon the subject, and obtain their approval of the proceeding at an election called for that purpose. Such approval having been obtained from the electors of Tippecanoe county, the board of commissioners of the county, during the years 1871, 1872, and 1873, subscribed and paid for stock in the Lafayette, Muncie, and Bloomington Railroad Company, a corporation organized under the laws of the State, and engaged at the time in building a railroad passing through the county. The stock thus subscribed and paid for amounted to six thousand six hundred and ten shares, of the par value of fifty dollars a share; and for them the company issued its certificates to the commissioners. The money with which the stock was paid was collected by a special tax levied for that purpose. The act provided for collecting the money before the subscription could be made.

Afterwards, on the 17th of December, 1872, the legislature passed an act "to require railroad companies to issue stock, paid for by taxes voted in aid of the construction of their railroads, to the tax-payers or their assigns, and to issue unclaimed stock for the benefit of the common-school fund." This act provided, that, in all cases where stock had been taken by counties and paid for from taxes levied and collected under the act of May, 1869, it should be the duty of the treasurer of the proper county, upon request prior to Jan. 1, 1874, to issue to the several tax-payers living, and to the personal representatives of such as may have died, a certificate, stating the amount of tax paid by them respectively, the date of payment, and the

name of the company in aid of which the tax was paid, as the fact should appear from the proper tax duplicates and record in his office.

The certificates thus issued were made assignable, and any lawful holder could present and surrender them to the proper company previous to Jan. 1, 1874, in sums equal in amount to any number of shares, and it was made the duty of the company to issue a certificate of paid-up capital stock to the amount of the certificate of taxes paid which was surrendered. For the stock unclaimed within the time designated a certificate was to issue to different townships in the county, for the benefit of the common-school fund. The act declared that the issuing of the stock to individuals or townships, as thus provided, should operate to cancel *pro tanto* the stock held by the county under the provisions of the act of May, 1869.

The present complaint was filed by the commissioners of the county in the Tippecanoe Civil Circuit Court, to restrain the treasurer of the county from issuing to tax-payers the certificates of taxes paid, as provided by the act of 1872. The treasurer had previously, against the remonstrance of the commissioners, issued a number of certificates to different parties, and declared his intention to issue certificates to all parties applying who were entitled to receive them under the act. In the complaint, the commissioners denied the power of the State to take the stock, or any part of it, from them, and give it to individuals for their private benefit; and alleged, that by the issuing of the certificates their right was made questionable, a cloud was cast upon their title, and the market value of the stock held by them was destroyed, and that they were deprived of their rights as stockholders in the company. They, therefore, prayed that a temporary injunction be granted against the treasurer, and that it might be made perpetual on the hearing.

The complaint was verified; and, after notice and argument of counsel, an order was made granting a temporary injunction, as prayed. On appeal to the Supreme Court of the State, the order, or the judgment, as it is termed in the language of the record, was reversed, and the cause remanded to the lower court, with instructions to dismiss the complaint. From this judgment the cause is brought to this court on a writ of error.

Mr. Z. Baird, for the plaintiff in error.

Under the Indiana Code of Procedure, the judgment of the Supreme Court, reversing that of the inferior court, and remanding the cause with instructions to dismiss the complaint, determined the merits of the controversy. It was, therefore, a final judgment within the meaning of the act of Congress. *Whiting* v. *The Bank of the United States*, 13 Pet. 15; *Forgay et al.* v. *Conrad et al.*, 6 How. 202; *French* v. *Shoemaker*, 12 Wall. 86; *Atherton et al.* v. *Fowler et al.*, 91 U. S. 143.

The plaintiff in error is a municipal corporation, exercising delegated powers, legislative, executive, and judicial. 1 Gavin & Hord, 247 *et seq.* It lawfully acquired the stock in controversy, and became the owner thereof in its corporate name, and cannot be deprived of it in the manner prescribed by the act of Dec. 17, 1872.

Where corporate powers are conferred, there is an implied contract between the State and the corporators that the property held under their charter shall not, without their consent, be taken and appropriated to other uses. *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518; Cooley on Const. Lim. 235; Dillon on Mun. Corp. 8; *Armstrong et al.* v. *The Board of Commissioners of Dearborn County*, 4 Blackf. 208; *Edwards* v. *Jaggers et al.*, 19 Ind. 406; *Terrett* v. *Taylor*, 9 Cranch, 43.

Under the constitution of Indiana, and the peculiar powers conferred by law upon the board of county commissioners, the latter, as to certain of such powers, — including that to acquire railroad stock, — is a private corporation. In levying the tax to create a fund with which to take the stock, it exercised power as a public corporation; but in making the subscription and acquiring the stock, for its advantage and emolument, it acted as a private corporation. It certainly does not hold the stock for public purposes in the sense that the power of the legislature over it is without limit, but, on the contrary, as a trustee for the benefit of the whole people of the country in their aggregate capacity. Its title is as valid as if the stock had been purchased with the funds collected for general purposes, if such funds could be lawfully applied thereto, or as if it had been acquired by gift, bequest, or in any other legitimate mode. The act in question attempts to divest that title, and vest

it in individuals. It is, therefore, clearly beyond the scope of the legislative power. *Town of Milwaukee* v. *City of Milwaukee*, 12 Wis. 93; *State of Wisconsin, ex rel., &c.*, v. *The County Court*, 34 id. 546; *Trustees of Dartmouth College* v. *Woodward, supra; Terrett* v. *Taylor, supra; State of Wisconsin, ex rel., &c.*, v. *Haben, Treasurer, &c.*, 22 Wis. 660; *Bailey* v. *The Mayor, &c.*, 3 Hill, 531; *Atkins* v. *Town of Randolph*, 31 Vt. 266.

Powers granted exclusively for public purposes are vested in the corporation in its public, political, or municipal character; but if the grant is for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, stands on the same footing as any individual or body of persons upon whom the like special franchises have been conferred. *Trustees of Dartmouth College* v. *Woodward, supra; Philips* v. *Berry*, 1 Ld. Raym. 8; S. C. 2 T. R. 352; *Allen* v. *McKean*, 1 Sumn. 297; *The People* v. *Morris*, 13 Wend. 331; 2 Kent, Com. 275 (4th ed.); *United States Bank* v. *Planters' Bank*, 9 Wheat. 907; *Clark* v. *Corporation of Washington*, 12 id. 40; *Moodalay* v. *East India Co.*, 1 Bro. Ch. 469.

As the act of Dec. 17, 1872, invades the right of private property and impairs the obligations of a contract, it is in violation of the Constitution of the United States, and void.

Mr. H. W. Chase and *Mr. J. R. Coffroth* for the defendant in error.

1. The judgment of the Supreme Court of Indiana is not final. The order of the Circuit Court awarding an injunction was merely interlocutory, passed at a preliminary state of the proceedings, and not upon the final hearing of the case, and the action of the Supreme Court was had upon that order.

2. A county, being a political organization for public purposes, is under the complete control of the State. Within the expressed constitutional restrictions, it or its property may be dealt with by the legislature as it deems wise and expedient, provided that the property be secured for the uses of those for whom and at whose expense it was originally purchased. *Darlington* v. *Mayor, &c.*, 31 N. Y. 164; *Lycoming* v. *Union*, 15 Penn. St. 166; *Grim* v. *Weissenbery*, 57 id. 433; *Philadelphia* v. *Fox*,

64 id. 169; *County* v. *County*, 12 Ill. 1; *Dennis* v. *Maynard*, 15 id. 477; *Love* v. *Schenck*, 12 Ired. 304: *Louisville, &c. Railroad Co.* v. *County Court, &c.*, 1 Sneed, 637; *Sharp* v. *Contra Costa Co.*, 34 Cal. 288; *State* v. *St. Louis Co.*, 34 Mo. 546; *City of Augusta* v. *North*, 57 Me. 392; *Wade* v. *Richmond*, 18 Gratt. 583; *State* v. *Votaw*, 8 Blackf. 2; *Sloan* v. *State*, id. 364; *State Bank* v. *Madison*, 3 Ind. 43; *Goodrich* v. *Winchester*, 26 id. 119; *Maryland* v. *Baltimore & Ohio Railroad Co.*, 3 How. 534; *East Hartford* v. *Hartford Bridge Co.*, 10 id. 511; *Mulligan* v. *Corbins*, 7 Wall. 487.

3. The stock in question was purchased by a fund raised for that specific purpose by the exercise of the taxing power. Dividing it among the tax-payers, in proportion to the amount by them severally contributed, conflicts with no constitutional provision. The board had but a naked legal title. The individual tax-payers were alone beneficially interested. The road having been completed, all participation in the management of the company was wisely withdrawn from the county board, which was organized solely for the administration of the affairs of the county.

MR. JUSTICE FIELD, after making the foregoing statement of the case, delivered the opinion of the court.

It is objected, *in limine*, that this court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. The order of the Circuit Court, granting a preliminary injunction, was, it is true, interlocutory, and, if the judgment of the Supreme Court of the State had been limited to a simple reversal, the objection would have been tenable. The cause would then have remained in the Circuit Court for further proceedings. But the direction to that court, accompanying the reversal of its order to dismiss the complaint, made a final disposition of the cause. With the entry of that judgment the cause was at an end. With the peculiarities of the practice of the Indiana courts we have nothing to do. If, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that State, it is no concern of ours. If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered

in the records of the court, constitutes a final judgment, subject in a proper case to our review, whatever may be its technical designation. The course adopted in this case was evidently pursued, from the fact that the whole merits of the controversy had been considered on the motion for the preliminary injunction. The application was founded upon the alleged invalidity of the act of 1872; no other matter was discussed, and all objections of form in the proceeding were waived, that the validity of the act might be considered and determined. Being determined against the view advanced by the plaintiffs, the cause, so far as the State courts were concerned, was practically at an end.

In this court, also, the validity of the act of 1872 is the sole question presented. The act is assailed here, as in the court below, as authorizing an invasion of the right of private property, and as impairing the obligation of an executed contract. Were the transaction one between the State and a private individual, the invalidity of the act would not be a matter of serious doubt. Private property cannot be taken from individuals by the State, except for public purposes, and then only upon compensation, or by way of taxation; and any enactments to that end would be regarded as an illegitimate and unwarranted exercise of legislative power. And any attempt by the legislature to take private property from its grantee, and restore it to its grantor, would be in conflict with the constitutional inhibition against impairing the obligation of contracts.

But between the State and municipal corporations, such as cities, counties, and towns, the relation is different from that between the State and the individual. Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn, at the pleasure of the legislature. Their tenure of property, derived from the State for specific public purposes, or obtained for such purposes through means which the State alone can authorize, — that is, taxation, — is so far subject to the control of the legislature, that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent character of their existence.

But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants. There are probably provisions in the constitutions of the several States which would prevent any marked diversion in that way; but whether a contract between the State and the municipality, within the protection of the Federal Constitution, is implied in such cases, that the property acquired shall not be diverted from the purposes of the municipality and appropriated to other uses, is a question we are not now called upon to determine. In the present case, it is not necessary for us to go over the ground, so ably explored by the judges of the Supreme Court of Indiana, and attempt to mark the line within which the State may control and dispose of property held by a municipal corporation, and beyond which its action is subject to the same restraints as are its dealings with the property of individuals. It is enough that the present case is free from difficulty. Here there is no attempted diversion of the property from the purpose for which it was acquired: that purpose has been accomplished. The money having been obtained by compulsory contribution from the inhabitants, the legislature could undoubtedly have directed its restitution to them at any time before the subscription was made. If the road had been previously built, and the aid contemplated had thus become unnecessary, such restitution would have been proper and just. Numerous cases might be named where the return of taxes collected would be the only just proceeding to be taken. Money raised for a special emergency may not be required by the emergency ceasing.

The changed condition of the property collected in this case, by its use in paying for the stock subscribed, could not affect the power of the State: it only made the subsequent distribution of the property to the tax-payers a matter of greater difficulty. Nor could the fact, that the commissioners of the county

took the certificate in their name for the stock subscribed, remove the property from the control of the State. The commissioners took the stock, not to hold as an investment which was to yield an annual revenue to the county, but to aid in the construction of a work in which the public were interested, — a railroad through the county. As justly observed by counsel, the management of the affairs of a railroad company is no part of the proper business of a county; and, when the purpose designed by the subscription was accomplished, it was sound policy to relieve the county officers from any participation in such management. Of the power of the State to direct a restitution to tax-payers of a county, or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in possession of the municipality, we have no doubt. The exercise of the power infringes upon no provision of the Federal Constitution. Further than this, it is not necessary for us to go for the disposition of this case.

Judgment affirmed.

HOME INSURANCE COMPANY *v.* CITY COUNCIL OF AUGUSTA.

1. Where a statute of, or authority exercised under, a State is drawn in question, on the ground of its repugnance to the Constitution of the United States, or a right is claimed under that instrument, the decision of a State court in favor of the validity of such statute or authority, or adverse to the right so claimed, can be reviewed here.
2. An insurance company conformed to the requirements of the act of the legislature of Georgia, and received from the comptroller-general a certificate authorizing it to transact business in that State for one year from Jan. 1, 1874. That act does not, expressly or by implication, limit or restrain the exercise of the taxing power of the State, or of any municipality. An ordinance of the city council of Augusta, passed Jan. 5, 1874, imposed from that date an annual license tax "on each and every fire, marine, or accidental insurance company located, having an office or doing business within" that city. *Held*, that the ordinance is not in violation of that clause of the Constitution of the United States which declares that "no State shall pass any law impairing the obligations of contracts."

ERROR to the Supreme Court of the State of Georgia.

A statute of the legislature of Georgia, to regulate insurance business and insurance agencies in the State of Georgia, passed March 19, 1869, enacts as follows: —

"SECTION 1. That it shall not be lawful for any insurance company, or agent of the same, excepting masonic, odd fellows, and religious mutual aid societies, already chartered by this State, to transact any business of insurance, without first procuring a certificate of authority from the comptroller-general of this State; and, before obtaining such certificate, such company must furnish the comptroller-general with a statement, under oath, specifying, —

"*First*, The name and locality of the company.

"*Second*, The condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items, in the following form: namely, — 1st, capital stock; 2d, assets, detailed; 3d, liabilities, detailed; 4th, income preceding year, detailed; 5th, expenditures preceding year, detailed; 6th, greatest risk; 7th, certified copy of charter.

"SECT. 2. The said statement shall be filed in the office of the comptroller-general, and the company shall show possession of at least $100,000 cash capital.

"SECT. 3. Upon filing such statement as aforesaid, the comptroller-general, when satisfied that the statement is correct, and that the company has fully complied with the provisions of this act, shall issue a certificate of authority to transact business of insurance in this State to the company applying for the same, and to all agents such company may appoint and commission.

"SECT. 4. Said statement must be renewed annually on the first day of January in each year, or within sixty days thereafter; and if the comptroller-general is satisfied that the capital, securities, and investments remain secured as at first, he shall furnish a renewal of the certificates. Insurance companies shall not be required to furnish but the single statement annually. The comptroller-general shall be entitled to a fee, for examining and filing each statement of such companies, of seven and one-half dollars, and for certificates to agents, of two and one-half dollars, — which fee shall be paid by the company or agent filing said statements, and to whom certificates are to be issued."

"SECT. 6. That all persons violating the provisions of this act shall be liable to indictment, and, on conviction, shall be fined not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the jury and court trying the same."

The plaintiff in error, a corporation organized under the laws of the State of New York, had an agency in the city of Augusta. On furnishing the required statement, it received

the certificate of the comptroller-general authorizing it to conduct the business of insurance in that city for one year from Jan. 1, 1874. Under a general law, it paid a tax of one per cent upon the gross amount of premiums received, and, under a city ordinance, a tax of one and a quarter per cent thereon.

On the 5th of January, 1874, the city council passed an ordinance, the first section of which provides, that, from and after that date, "the annual license tax on insurance companies shall be as follows: 1. On each and every life-insurance company located, having an office or doing business within the city of Augusta, $100. 2. On each and every fire, marine, or accidental insurance company located, having an office or doing business within the city of Augusta, $250.

The legislature, by an act passed Feb. 26, 1874, validated all existing ordinances of said city council imposing taxes for the support of its municipal government for 1874. Thereupon the plaintiff in error filed its bill in the Superior Court of Richmond County, to enjoin the council from collecting the license tax for that year imposed upon it, and claimed, as a ground of relief, that said ordinance impaired the obligation of the contract between the company and the State, whereby the former was authorized to transact the business of insurance therein, and thus violated that clause of the Constitution of the United States which declares that no State, and, *a fortiori*, no political subdivision of a State, "shall pass any law impairing the obligation of contracts."

The Superior Court refused the injunction prayed for, and dismissed the bill; and the decree having been affirmed by the Supreme Court of the State, the company brought the case here.

Mr. William M. Evarts, and *Mr. Salem Dutcher*, for the plaintiff in error.

An ordinance of a municipal corporation of a State is the exercise of an authority under that State. *Weston* v. *City Council of Charleston*, 2 Pet. 449.

A final judgment in any suit in the highest court of a State, in which a decision could be had affirming the validity of an ordinance of a municipal corporation of that State, which was

drawn in question on the ground of its repugnance to the Constitution of the United States, is subject to review by this court. *Weston* v. *City Council of Charleston*, *supra*; *Osborne* v. *Mobile*, 16 Wall. 479; *Cannon* v. *New Orleans*, 20 id. 577. The ordinance was the point on which the controversy turned, and the decision of the Supreme Court of the State was in favor of its validity.

The compliance of the company with the terms of the act of 1869 and the action of the State thereunder, form a contract within the meaning of art. 1, sect. 10, clause 1, of the Constitution of the United States. It is identical in principle with, although differing in form from, that in *Fletcher* v. *Peck*, 6 Cranch, 87. The considerations are, to the former, authority to do business in the State for a specified period; to the latter, the public advantages arising from the operations in the State of a corporation coming up to the prescribed standard of usefulness, solvency, and reliability.

"The word 'license' means permission or authority; and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purposes to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license." *Gibbons* v. *Ogden*, 9 Wheat. 563 (580); *State Tonnage Tax Cases*, 12 Wall. 204 (215). A license is a contract. "It is a right given by some competent authority to do an act which, without such authority, would be illegal." Bouvier, Law Dict.; *Mayor, &c. of Rome* v. *Lumpkin*, 5 Ga. 447; *Chastain* v. *Town Council of Calhoun*, 29 id. 333; *Adams* v. *Mayor of Albany*, 29 id. 56; *Wood* v. *City of Brooklyn*, 14 Barb. 425; *Martin* v. *O'Brien*, 34 Miss. 21; *Leonard* v. *City of Canton*, 35 id. 189; *Boyd and Jackson* v. *The State*, 46 Ala. 329; *Martin* v. *O'Brien*, 34 Miss. 21; *Philadelphia Association* v. *Wood*, 39 Penn. St. 73.

It is submitted that the license tax imposed after the required authority had been conferred by the State, on a full compliance by the company with the stipulated conditions in question, cannot be sustained, and that the city could not, during the year 1874, limit, burden, or obstruct, in any way, the

exercise by the company of its right to transact its legitimate business, — a right secured by the contract with the State. The amount of "license tax" exacted is immaterial. *Brown* v. *Maryland*, 12 Wheat. 419; *Mayor, &c. of Rome* v. *Lumpkin et al.*, 5 Ga. 447; *Adams* v. *Mayor of Albany*, 29 id. 56; *Chastain* v. *Town Council of Calhoun*, 29 id. 333; *Sanders* v. *Town Commissioners of Butler*, 30 id. 679; *Mayor, &c. of Savannah* v. *Charlton*, 36 id. 460; *Mayor, &c. of New York* v. *Nichols*, 4 Hill, 209; *Wood* v. *City of Brooklyn*, 14 Barb. 425; *Stein* v. *Mayor, &c. of Mobile*, 49 Ala. 362; *Mayor, &c. of New York* v. *Second Avenue R. R. Co.*, 32 N. Y. 261; *Leonard* v. *City of Canton*, 35 Miss. 189; *Martin* v. *O'Brien*, 34 id. 21; *Boyd and Jackson* v. *The State*, 46 Ala. 329; *Philadelphia Association* v. *Wood*, 39 Penn. St. 73; *Prince* v. *City of St. Paul*, 19 Minn. 267.

Mr. William Brown, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

Under an act of the legislature of Georgia, of the 19th of March, 1869, the insurance company procured the requisite authority to transact, by itself or agents, the business of insurance for one year, from the 1st of January, 1874, and, at the option of the company, for sixty days longer.

The company thereupon established an office and agency in the city of Augusta, and thereafter transacted business at that place. A general law of the State imposed a tax of one per cent upon the gross amount of premiums received. An ordinance of the city imposed a tax of one and a quarter per cent upon such receipts. These taxes were paid by the company without objection. On the 5th of January, 1874, the city council passed an ordinance which imposed, further, a license tax of $250 "on each and every fire, marine, or accidental insurance company located, having an office, or doing business within the city of Augusta." The bill was filed to enjoin the collection of this tax. The Superior Court of Richmond County sustained the validity of the tax, and dismissed the bill. The Supreme Court of the State affirmed the decree. The complainant thereupon sued out a writ of error, and removed the case to this court.

In the argument here, it was insisted by the defendant in error that this court has no jurisdiction of the case. We will first consider this objection. The bill alleges that the ordinance imposing the tax in question is void for many reasons, and, among them, that it is in conflict with the contract clause of the Constitution of the United States.

Where a judgment or decree is brought to this court by a writ of error to a State court for review, the case, to warrant the exercise of jurisdiction on our part, must come within one of three categories: —

1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain.

2. Or there must have been drawn in question a statute of, or authority exercised under, a State, upon the ground of repugnance to the Constitution, or a law or treaty of, the United States; and the decision must have been in favor of the validity of the State law or authority in question.

3. Or a right must have been claimed under the Constitution, or a treaty, or law of, or by virtue of a commission held or authority exercised under, the United States; and the decision must have been against the right so claimed. Rev. Stat. 132, sect. 709; *Sevier* v. *Haskell*, 14 Wall. 15; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *McGwyre* v. *The Commonwealth*, 3 Wall. 385.

Here there was drawn in question the authority exercised by the city council under the State in passing the ordinance imposing the tax complained of. The question raised was as to its repugnancy to the Constitution of the United States; and the decision was in favor of the validity of the authority so exercised. A right was also claimed under the Constitution of the United States. The decision was adverse to the claim. The case is, therefore, within two of the categories we have stated. The jurisdictional objection cannot be maintained.

This brings us to the consideration of the case upon its merits. Whether the claims which give us jurisdiction are well founded, is the question to be considered.

The national Constitution (art. 1, sect. 10, clause 1) declares

that "no State shall pass any law impairing the obligation of contracts."

The act of 1869, before mentioned, forbids any company to do the business of insurance in the State, without first obtaining a certificate from the comptroller-general of the State. Before obtaining such certificate, every company is required to furnish a sworn statement, setting forth certain specified particulars. Upon being satisfied of the truth of the statement, he is required to issue the certificate. He is entitled to a fee of seven dollars and a half for examining and filing each statement, and a fee of two dollars and a half for each certificate. The fifth section declares that whatever deposits, taxes, penalties, certificates, or license-fees are exacted from Georgia companies in any other State, shall be exacted from the companies of such State in Georgia. It does not appear by the record that any Georgia insurance company was doing business in New York in the year 1874. This section, therefore, does not affect the case in hand. The act contains no other allusion to the subject of taxation. It does not, therefore, circumscribe in any degree the taxing power of the State, or of any municipality within the State clothed with such authority. It left both, in this respect, standing just where they would have stood if this act had not been passed. It contained no stipulation, express or implied, that either should be thereby in any wise limited or restrained.

If it were competent for the State to impose the tax of one per cent upon the gross amount of premiums received, would it not have been equally so for the State to impose a further tax, the same with that in question, and in the same way? And if it were competent for the city council to impose the tax of one and a quarter per cent upon the same receipts, why might it not impose the further burden here in question? If the State could impose the further tax, why not the municipality? Is there any sensible ground of contract prohibition upon which the claim of exemption from either can be placed? This question must necessarily be answered in the negative. We find no semblance of a contract that additional taxes should not be imposed.

In *The License Cases*, 5 Wall. 462, the nature of the tax exaction here in controversy was carefully considered by this court.

There the revenue laws of the United States required payment in advance to be made for permission to carry on the business of selling liquor, and of selling lottery-tickets. It was provided that no license so granted, or special tax so laid, should be construed to authorize any business within a State forbidden by the laws of such State, or so as to prevent the taxation by the State of the same business.

This court held that the payment required was a special tax, levied in the manner prescribed; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax. It was held further, that, as regards the reservation of power in favor of the States, the result would have been the same if the acts of Congress had been silent upon the subject. This was necessarily so, because the objects taxed belonged to the internal commerce of the States, and were within their police power, and the right of Congress and the States to tax was concurrent. Congress could, therefore, no more restrict the power of a State than the State could restrict that of Congress.

What is said there as to license taxes is applicable to the case before us. There is no difference in principle between such a tax and those which have been paid by the plaintiff in error to the defendant in error, and to the State, without objection.

In the ordinance in question the tax is designated "a license tax," but its payment is not made a condition precedent to the right to do business. No special penalty is prescribed for its non-payment, and no second license is required to be taken out. Had the ordinance been otherwise in these particulars, we have seen, viewing the subject in the light of the *License Tax Cases*, that the result would have been the same.

The case in all its aspects was ably and elaborately examined by the Supreme Court of the State. Their conclusion upon the "Federal question" we have considered is the same with ours. There being no other such question raised in the record, our duty is thus terminated. We have no authority to look further into the case. *Judgment affirmed.*

COUNTY OF CALHOUN ET AL. v. AMERICAN EMIGRANT COMPANY.

1. A deed takes effect only from the time of delivery, and, when deposited as an escrow, nothing passes by it unless the condition is performed.
2. A county, by its contract for the sale of lands, whereof it was the owner, stipulated that it would not assess taxes against them until after they should be conveyed. The deed was executed, and deposited with the clerk of the board of county supervisors as an escrow, and was not to be delivered until the performance by the grantee of a certain condition. The condition was not performed; and the deed having been surreptitiously placed on record, the county brought suit to set it and the contract aside. The court, on May 20, 1872, by consent, dismissed the bill, and decreed that such dismissal should for ever bar and estop the county from setting up any right or title to the lands in controversy. In July following, the county listed certain of the lands for taxes for the years 1870 and 1871; and was proceeding to enforce collection, when the court below, upon a bill filed for that purpose by the appellee, decreed that the assessment was void, and enjoined all proceedings by the county in the matter. *Held*, that the decree was proper.

APPEAL from the Circuit Court of the United States for the district of Iowa.

The facts are stated in the opinion of the court.

Submitted on the record by *Mr. James Grant* for the appellants, and on printed arguments by *Mr. C. C. Nourse* for the appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Power is vested in the Circuit Court to enjoin the collection of a municipal tax, where it appears that the assessors acted without authority of law, and in violation of a special contract between the municipality imposing the tax and the tax-payer.

Swamp-lands were owned by the county of Calhoun, and the record shows that the proper authorities of the county contracted to sell the same to the American Emigrant Company, the county stipulating that they would not assess any taxes against the lands until after the time the lands should be conveyed to the company.

Pursuant to that contract, the supervisors of the county made a deed of the lands to the Emigrant Company; but they recited in the instrument that the deed was deposited with the clerk of

their board as an escrow, and that it was not to be delivered to the grantees until they should execute a mortgage back to the county, conditioned to secure the full performance of the contract. Such a mortgage was never executed; but the evidence shows that the deed, by some means or agency not explained, was filed for record, and that it was duly recorded. Controversy ensued, and the county instituted a suit to set aside the contract and the deed. Pending the suit, the parties made a settlement; and, as a part of the terms of the same, the county, in consideration of certain moneys paid by the other party, consented to a decree, declaring the title to the swamp-lands, and swamp-land interests of the county, to be in the Emigrant Company.

Sufficient also appears to show, that the Emigrant Company complied with all the terms of the settlement, and that the Circuit Court, where the suit was pending, entered a decree, by consent of the parties, dismissing the bill of complaint, and decreed that the decree of dismissal should for ever operate as a bar and estoppel upon the county to set up any right or title to the lands in controversy. Prior to that decree, which bears date the 20th of May, 1872, the lands described in the contract had not been assessed for the two preceding years, as is averred in the bill of complaint and admitted in the answer.

Public property is not subject to taxation by the law of the State, and consistency forbade the county to assess the lands pending the controversy, as the deed had never been sanctioned or approved by the county or their proper officers. Instead of that, it appears that the authorities of the county uniformly maintained that the possession of the deed for registry was surreptitious and wrongful, and that the title to the lands was still in the county. They accordingly withheld the lands from taxation during those years; and the complainants charge that the treasurer, subsequent to the settlement and decree, caused the lands described in the two schedules set forth in the record to be listed and entered in the tax duplicates, and pretended to extend a computation of taxes, interest, penalties, and costs thereon, according to the rates of levy of the two preceding years, amounting to the sum set forth in the record, whereas the complainants aver that the title was decreed to them at the

time of the settlement, with the full understanding that no taxes were payable on the lands for those two years, and that the acts of the treasurer in listing the lands and assessing the taxes were without authority of law, and they pray that the pretended assessment and levy of the taxes may be decreed to be illegal, null, and void, and that the county treasurer and his agents and successors may be for ever enjoined from selling the lands, or in any manner enforcing the collection of said pretended taxes.

Process was duly issued and served, and the proper authorities of the county appeared and filed an answer, setting up the following defences: 1. That the complainants are the legal owners of the lands described in the contract, by virtue of the deed from the county. 2. That the county had no right to exempt the lands from taxes. 3. That the agreement was unauthorized and in violation of the laws of the State, and is null and void.

Certain admissions of the respondents are also contained in the answer, which it is important to notice: 1. That the deed was deposited as an escrow until a mortgage back should be executed; but the respondents aver that it was the fault of the complainants that it was not executed, and they insist that the complainants cannot claim any benefit from their own neglect. 2. That the settlement and decree were made as alleged; but the respondents aver that the settlement ratified the deed, and gave complainants a legal title relating back to the date of the execution of the same. 3. That the officers of the county did not assess taxes on the lands pending the suit; but the respondents aver that the failure of the officers to do so did not waive the right of the county to assess the lands and collect the taxes. 4. That the title to the lands in the other schedule is in the United States; but the respondents aver, that if that be so, then no sale of the same for taxes will be of any validity.

Proofs having been duly taken and the parties fully heard, the court entered a decree in favor of the complainants, and the respondents appealed to this court.

Enough appears in the pleadings in this case to show that the deed from the county to the complainants was never

delivered to the grantees until the settlement and decree; and it is settled law, of universal application, that a deed takes effect only from the time of delivery, even though it may have been fully executed at a much earlier period. *Hopkins* v. *Leek*, 12 Wend. 105; *Hardenberg* v. *Schoonmaker*, 2 Johns. 23.

Beyond doubt, the deed of the lands was delivered to the clerk of the respondents as an escrow, and subject to the condition that it should not be delivered to the grantees until they gave back a mortgage to secure the full performance of the agreement under which the deed was executed; but it is equally clear that the condition required to be fulfilled before the delivery could be made was never performed, and the rule is established by repeated decisions, that, where a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed. *Hinman* v. *Booth*, 21 Wend. 267; *Green* v. *Putnam*, 1 Barb. 500; *Russell* v. *Rowland*, 6 Wend. 666; *Pendleton* v. *Hughes*, 65 Barb. 136; S. C. 53 N. Y. 626.

Cases may be found where it is held that a deed delivered as an escrow, when the condition is performed, relates back to the time of its execution; and that proposition may be correct under certain circumstances, where the ends of justice require its application. *Beekman* v. *Frost*, 18 Johns. 544; S. C. 1 Johns. Ch. 288.

Much would depend in such a case upon the intent of the parties, to be collected from the nature of the transaction; but it is clear that the rule cannot apply in this case, for several reasons: 1. Because the condition inserted in the instrument never was performed. 2. Because the county never relinquished their title to the lands until the settlement and decree. 3. Because the county could not assess the lands while they remained public property. 4. Because the written agreement stipulated that no taxes should be levied on the lands until after the lands should be conveyed to the complainant.

Responsive to that, the respondents suggest that it is the fault of the complainants that the deed was not delivered; but it must not be overlooked that it was the respondents or their agents who inserted the stipulation in the instrument that it should be deposited as an escrow with their clerk until a

mortgage back should be executed to secure the full performance of the terms of the written agreement.

Nothing is contained in the written agreement to warrant the respondents in requiring a mortgage back before delivering the deed; but it is expressly stipulated therein that the respondents will not assess any taxes against the lands until after the time the lands shall be conveyed to the complainants. Nor does it affect the question that the deed was previously recorded, as it is clear that the theory of the respondents throughout was that it was wrongfully procured for registry; and nothing appears to controvert their theory in that regard. By what means it was procured does not appear; but it does appear that the complainants are unable to explain the matter, for the reason that their agent who transacted the negotiations on their part is deceased.

Other suggestions failing, the respondents contend that the agreement not to tax the land before the conveyance was made is without authority of law, and is null and void; but the court here is not able to concur in that proposition, as the lands were held by the county in their proprietary right, and as such were as much subject to bargain and sale as lands held by an individual. Counties have no right to tax public property by the laws of the State; and the restriction in this case only extended to the time the conveyance should be made, in view of which the better opinion is, that, as between these parties in respect to the right of taxation, the title did not pass until the settlement and decree.

Argument is not required to prove that the respondents agreed not to tax the lands before they were conveyed, nor to prove that the deed was deposited as an escrow, nor that the taxes were levied by the treasurer subsequent to the settlement and decree, for the reason, that all three of these propositions are admitted by the answer.

Taxes imposed against those lands for the two years preceding the settlement and decree cannot be sustained in view of those admissions, especially as it also appears that the respondents, early in the month of April, 1869, instituted a suit in equity, in which they set up title to the lands, and prayed for a decree to set aside the written agreement and the deed, and that they

continued to prosecute that suit from the time it was commenced to the date of the settlement and decree.

Throughout the whole period, the county claimed the fee-simple title in these lands, and maintained the theory that the complainants were not entitled thereto, and that the deed had been illegally recorded; and it appears that they never occupied any other position in the controversy until the settlement and the decree of the Circuit Court, to which the suit was removed pending the litigation.

By that settlement, the complainants agreed to pay to the respondents the sum of $2,300 cash, and to pay all costs and expenses of the suit, including a described portion of the counsel fees of the respondents; and it is not controverted that the complainants fulfilled all the terms of the adjustment.

Viewed in the light of these suggestions, it is clear that the respondents are estopped to set up any such claim against the complainants.

Taken as a whole, the circumstances disclosed in the record satisfy the court that the settlement was made with a full understanding between the parties, that no taxes were payable on the lands for the two years next preceding the date of the decree, and that the respondents are estopped to set up any different theory in the present controversy.

Where a municipal corporation sells a tract of land, and their authorized agents represent that there are no municipal taxes assessed against the same, neither the municipality nor its proper officers can collect from the grantees taxes for preceding years, if assessed subsequently to the conveyance. Omissions resulting from inadvertence or mistake of the assessors may doubtless be corrected, and such an assessment, it is not doubted, is legal, and may be collected; but good faith forbids such an assessment as the one before the court, which was made in violation of a written agreement and of an explicit understanding between the parties in the adjustment of a pending controversy.

Decided support to the views here expressed is found in the decisions of the Supreme Court of the State, to which reference is made. *Iowa Land Co.* v. *Story County*, 36 Iowa, 50. Circumstances substantially similar were disclosed in that case, and the court say, "We do not stop to inquire what would be the

rule respecting liability for taxes as between vendor and purchaser, in cases where the latter, by performance of his contract, has become the owner, though the legal title is in the former; because we ground our support of the plaintiff's case upon this plain rule of fair dealing and the broad principles of equity, that a party shall not wrongfully withhold the title to property and the benefits of ownership thereof from one entitled thereto, and at the same time subject the property to burdens, for the benefit of the party thus wrongfully withholding the title." In other words, the county having during those years denied the right and title under which the plaintiff claims, is now equitably estopped from asserting that the plaintiff then had the title in order to give validity to the burden imposed. *Davidson* v. *Follett*, 37 Iowa, 220; *Adams Co.* v. *Railroad*, 39 id. 511; *Lucas* v. *Hart*, 5 id. 419; *Swain* v. *Seamens*, 9 Wall. 274.

Corporations, quite as much as individuals, are held to a careful adherence to truth and uprightness in their dealings with other parties; nor can they be permitted, with impunity, to involve others in onerous obligations, by their misrepresentations or concealments, without being held to just responsibility for the consequences of their misconduct or bad faith.

Decree affirmed.

CLAFLIN *v.* HOUSEMAN, ASSIGNEE.

1. Under the Bankrupt Act of March 2, 1867 (14 Stat. 517), the assignee might sue in the State courts to recover the assets of the bankrupt, no exclusive jurisdiction having been given to the courts of the United States. *Quære*, whether such exclusive jurisdiction is given by the Revised Statutes.
2. The statutes of the United States are as much the law of the land in any State as are those of the State; and although exclusive jurisdiction for their enforcement may be given to the Federal courts, yet where it is not given, either expressly or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to.
3. In such cases, the State courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction, derived from their constitution under the State law.

ERROR to the Supreme Court of the State of New York.

This action was brought in May, 1872, in the New York Supreme Court, county of Kings, by Julius Houseman, as

assignee in bankruptcy of Comstock and Young, against Horace B. Claflin, under the thirty-fifth section of the Bankrupt Act, to recover the sum of $1,935.57, with interest, being the amount collected by Claflin on a judgment against the bankrupts, recovered within four months before the commencement of proceedings in bankruptcy. The ground of the action, as stated in the complaint, was that they (the bankrupts) suffered the judgment to be taken by default, with intent to give Claflin a preference over their other creditors, at a time when they were insolvent, and when he knew, or had reasonable cause to believe, that they were insolvent, and that the judgment was obtained in fraud of the bankrupt law. The defendant demurred to the complaint, assigning as cause, first, that the court had no jurisdiction of the subject of the action; secondly, that the complaint did not state facts sufficient to constitute a cause of action. Judgment was rendered for the plaintiff on the thirteenth day of January, 1873, and was subsequently affirmed both by the general term of the Supreme Court and by the Court of Appeals. This judgment is brought here by writ of error, under the second section of the act of Feb. 5, 1867 (14 Stat. 385).

Argued by *Mr. William Henry Arnoux* for the plaintiff in error.

Where Congress has an exclusive right to legislate, the Federal courts have an exclusive power to adjudicate. *United States* v. *Ames*, 1 W. & M. 76; *United States* v. *Bailey*, 9 Pet. 261; *United States* v. *Cornell*, 2 Mason, 91; *Osborn* v. *U. S. Bank*, 9 Wheat. 818.

Where a State cannot legislate, its courts cannot adjudicate. *United States* v. *Lathrop*, 17 Johns. 4; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Rose* v. *Hinely*, 4 Cranch, 241; *McLean* v. *Lafayette Bank*, 3 McLean, 191; *Stearns* v. *United States*, 2 Paine, 311; *Shearman* v. *Bingham*, 7 N. B. R. 490.

The jurisdiction of the courts of the United States is *exclusive* in all cases arising under the Constitution, laws, or treaties of the United States. Const. U. S., art. 3, sects. 1, 2; 2 Story on Const., sect. 1754; *Martin* v. *Hunter's Lessee*, *supra; Ex parte Cabrera*, 1 Wash. C. C. 232; *Griffin* v. *Domingues*, 2 Duer, 576; *Mannhardt* v. *Joderstron*, 1 Binn. 138; *Commonwealth* v.

Kostaff, 5 Serg. & R. 545; *Davis* v. *Packard*, 7 Pet. 276; *Houston* v. *Moore*, 5 Wheat. 1.

The Bankrupt Act of March 2, 1867, by a just construction of its terms, confers exclusive jurisdiction upon the district and circuit courts of the United States. *Goodall* v. *Tuttle*, 7 N. B. R. 193; *In re Alexander*, 3 id. 6; *Shearman* v. *Bingham*, 7 id. 490; *Ex parte Christy*, 3 How. 292; *Mitchell* v. *Great Milling Works Co.*, 2 Story, 656; *Peck* v. *Jennes*, 7 How. 621; *McLean* v. *Lafayette Bank*, 3 McLean, 190; *Moore* v. *Jones*, 23 Vt. 746.

The right of an assignee to bring suits for the collection of the assets of a bankrupt is a new right conferred upon him by an act of Congress. *Cook* v. *Whipple*, 55 N. Y. 150. Therefore the remedy afforded by the statute is exclusive. *Dudley* v. *Mayhew*, 3 N. Y. 15; *Jordan Plank Road* v. *Morley*, 23 id. 554; *Thurber* v. *Blanck*, 50 id. 80; *Hollister* v. *Hollister Bank*, 2 Keyes, 248; *Almy* v. *Harris*, 5 Johns. 175; *Rex* v. *Robinson*, 2 Burr. 799.

The fact that an assignee in bankruptcy is dependent upon the national tribunals, and independent of those of the States, is conclusive against the jurisdiction of the latter, over statutory actions brought by him as an officer appointed under the laws of the United States. The State courts can neither interfere with, or interrupt, the exercise of the authority with which he is clothed, nor aid in enforcing it. *McKim* v. *Voorhies*, 7 Cranch, 279; *Slocum* v. *Mayberry*, 2 Wheat. 1; *McClung* v. *Silliman*, 6 id. 598; *United States* v. *Barney*, 3 Hall's L. J. 128; *United States* v. *Peters*, 5 Cranch, 115; *McNutt* v. *Bland*, 2 How. 17; *Hopkins* v. *Stockton*, 2 Watts & S. 163.

The United States and the States are distinct and independent autonomies in their sovereign capacity, and their laws are foreign to each other, except in their surrendered powers. *Ohio L. & T. Co.* v. *DeBolt*, 16 How. 428; *Buckner* v. *Finley*, 2 Pet. 590; *Bank of Augusta* v. *Earle*, 13 id. 520. Therefore the State courts have no jurisdiction over an action brought by a person acting in a representative capacity, who has been appointed by a foreign tribunal. *Vermilye* v. *Beatty*, 6 Barb. 429; *Parsons* v. *Lyman*, 20 N. Y. 103; *Williams* v. *Storrs*, 6 Johns. Ch. 353; *Doolittle* v. *Lewis*, 7 id. 45; *Vroom*

v. *Van Horn*, 10 Paige, 549; *Morrell* v. *Dickey*, 1 Johns. Ch. 153; *Brown* v. *Brown*, 1 Barb. Ch. 189; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *Matter of Estate of Butler*, 38 id. 400; *Mosselman* v. *Caen*, 34 Barb. 66; *Abraham* v. *Plestero*, 3 Wend. 538; *Willetts* v. *Waite*, 25 N. Y. 577; *Harrison* v. *Sterry*, 5 Cranch, 299; *Johnson* v. *Hunt*, 23 Wend. 87; *Hoyt* v. *Thompson*, 5 N. Y. 340; *Peale* v. *Phipps*, 14 How. 368; *Orr* v. *Amory*, 11 Mass. 25; *Booth* v. *Clark*, 17 How. 322.

Submitted on printed arguments by *Mr. B. F. Lee* for the defendant in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy cannot sue in the State courts.

It is argued that the cause of action arises purely and solely out of the provisions of an act of Congress, and can only be prosecuted in the courts of the United States, the State courts having no jurisdiction over the subject. It is but recently settled that the several district and circuit courts of the United States have jurisdiction, under the bankrupt law, of causes arising out of proceedings in bankruptcy pending in other districts. There had been much doubt on the subject, but it was finally settled at the last term of this court in favor of the jurisdiction. *Lathrop, Assignee*, v. *Drake et al.*, 91 U. S. 516. Had the decision been otherwise, as for a long period was generally supposed to be the law, assignees in bankruptcy, if the position of the plaintiff in error is correct, would have been utterly without remedy to collect the assets of the bankrupt in districts other than that in which the bankruptcy proceedings were pending. Neither the State courts nor the Federal courts could have entertained jurisdiction. The Revised Statutes, whether inadvertently or not, have made the jurisdiction of the United States courts exclusive in "all matters and proceedings in bankruptcy." Sect. 711. Whether this regulation will or will not affect the cognizance of plenary actions and suits, it is not necessary now to determine. At all events, the question of such cognizance must be met in this case; and, being important in the principles involved, would

require much deliberate consideration, had it not been already in effect decided by the court.

In the opinion of the court, in *Lathrop, Assignee*, v. *Drake et al.*, it was taken for granted, and stated, that the State courts had jurisdiction (p. 518); but as the question was not directly involved in that case, it was more fully considered in *Eyster* v. *Gaff et al.*, 91 U. S. 521, and it was there decided that a State court is not deprived of jurisdiction of a case by the bankruptcy of the defendant, but may proceed to judgment without noticing the bankruptcy proceedings, if the assignee does not cause his appearance to be entered, or proceed against him if he does appear. If there were any thing in the Constitution to incapacitate the State courts from taking cognizance of causes after the bankruptcy of the parties, as the constitutional argument of the plaintiff in error supposes, the proceedings in bankruptcy would *ipso facto* determine them. But on this subject, in *Eyster* v. *Gaff et al.*, the court say: "It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition." Again: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with, and does not divest that of, the State courts." pp. 525, 526.

The same conclusion has been reached in other courts, both Federal and State, which hold that the State courts have concurrent jurisdiction with the United States courts of actions and suits in which a bankrupt or his assignee is a party. See *Samson* v. *Burton*, 4 Bank. Reg. 1; *Payson* v. *Dietz*, 8 id. 193; *Gilbert* v. *Priest*, 8 id. 159; *Stevens* v. *Mechanics' Savings Bank*, 101 Mass. 109; *Cook* v. *Whipple*, 55 N. Y. 150; *Brown* v. *Hall*, 7 Bush, 66; *Mays* v. *Man. Nat. Bank*, 64 Penn. 74. There are contrary cases, it is true, as *Brigham* v. *Claflin*, 31 Wis. 607,

Voorhees v. *Frisbie*, 25 Mich. 476, and others; but we think that the former cases are founded on the better reason.

The assignee, by the fourteenth section of the Bankrupt Act (Rev. Stat. sect. 5046), becomes invested with all the bankrupt's rights of action for property, and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common-law actions, ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity. Of these actions and suits the State courts have cognizance. Why should not an assignee have power to bring them in those courts, as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the State courts?

The case is exactly the same as that of the Bank of the United States. The first bank, chartered in 1791, had capacity given it "to sue and be sued . . . in courts of record, or any other place whatsoever." It was held, in *The Bank* v. *Deveaux*, 5 Cranch, 61, that this did not authorize the bank to sue in the courts of the United States, without showing proper citizenship of the parties in different States. The bank was obliged to sue in the State courts. And yet here was a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy. The second bank of the United States had express capacity "to sue and be sued in all State courts having competent jurisdiction, and in any Circuit Court of the United States." In the case of *Osborn* v. *The Bank*, 9 Wheat. 738, 815, it was objected that Congress had not authority to enable the bank to sue in the Federal courts merely because of its being created by an act of Congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State courts.

Under the bankrupt law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the State courts. *Ex parte Christie*, 3 How. 318, 319; *Nugent* v. *Boyd*, id. 426; *Wood* v. *Jenkins*, 10 Met. 583.

Other analogous cases have occurred, and the same result has

been reached; the general principle being, that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the State courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by United States authority may be enabled to sue in such courts. Nothing in the Constitution, fairly considered, forbids it.

The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, — sometimes with a leaning in one direction and sometimes in the other, — but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the Federal and State governments, there is really no just foundation for excluding the State courts from all such jurisdiction.

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, — concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired

under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 429, and Story, J., in *Martin* v. *Hunter's Lessee*, 1 Wheat. 334; and of Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth*, 21 How. 506; and hence the State courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.

A reference to some of the discussions, to which the subject under consideration has given rise, may not be out of place on this occasion.

It was fully examined in the eighty-second number of "The Federalist," by Alexander Hamilton, with his usual analytical power and far-seeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate. After showing that exclusive delegation of authority to the Federal government can arise only in one of three ways, — either by express grant of exclusive authority over a particular subject; or by a simple grant of authority, with a subsequent prohibition thereof to the States; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the States, — he says, that these principles may also apply to the judiciary as well as the legislative power. Hence, he infers that the State courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes. But, as their previous jurisdiction could not by possibility extend to cases which might grow out of and be peculiar to the new constitution, he considered that, as to such cases, Congress might give the Federal courts sole jurisdiction. "I hold," says he, "that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and, in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When, in addition to this, we consider the State governments and the national government, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

These views seem to have been shared by the first Congress in drawing up the Judiciary Act of Sept. 24, 1789; for, in distributing jurisdiction among the various courts created by that act, there is a constant exercise of the authority to include or exclude the State courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases.

Thus, by the Judiciary Act, exclusive cognizance was given to the circuit and district courts of the United States of all crimes and offences cognizable under the authority of the United States; and the same to the district courts, of all civil causes of admiralty and maritime jurisdiction, of all seizures on water under the laws of impost, navigation, or trade of the United States, and of all seizures on land for penalties and forfeitures incurred under said laws. Concurrent jurisdiction with the State courts was given to the district and circuit courts of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States, and of all writs at common law where the United States are plaintiffs; the same to the circuit courts, where the suit is between a citizen of the State where the suit is brought and a citizen of another State, where an alien is a party, &c. Here, no distinction is made between those branches of jurisdiction in respect to which the Constitution uses the expression "*all cases*," and those in respect to which the term "all" is omitted. Some have supposed that wherever the Constitution declares that the judicial power shall extend to "all cases," — as, all cases in law and equity arising under the Constitution, laws, and treaties of the United States; all cases affecting ambassadors, &c., — the jurisdiction of the Federal courts is necessarily exclusive; but that where the power is simply extended "to controversies" of a certain class, — as, "controversies to which the United States is a party," &c., — the jurisdiction of the Federal courts is not necessarily exclusive. But no such distinction seems to have been recognized by Congress, as already seen in the Judiciary Act; and subsequent acts show the same thing. Thus, the first patent law for securing to inventors

their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case founded on the statute in the Circuit Court of the United States, "or any other court having competent jurisdiction," — meaning, of course, the State courts. The subsequent acts on the same subject were couched in such terms with regard to the jurisdiction of the circuit courts as to imply that it was exclusive of the State courts; and now it is expressly made so. See Patent Acts of 1800, 1819, 1836, 1870, and Rev. Stat. U. S., sect. 711; *Parsons* v. *Barnard*, 7 Johns. 144; *Dudley* v. *Mayhew*, 3 Comst. 14; *Elmer* v. *Pennel*, 40 Me. 434.

So with regard to naturalization, — a subject necessarily within the exclusive regulation of Congress, — the first act on the subject, passed in 1790, and all the subsequent acts, give plenary jurisdiction to the State courts. The language of the act of 1790 is, "any common-law court of record in any one of the States," &c. 1 Stat. 103. The act of 1802 designates "the Supreme, Superior, District, or Circuit Court of some one of the States, or of the territorial districts of the United States, or a circuit or district court of the United States." 2 Stat. 153.

So, by acts passed in 1806 and 1808, jurisdiction was given to the county courts along the northern frontier, of suits for fines, penalties, and forfeitures under the revenue laws of the United States. 2 Stat. 354, 489. And by act of March 3, 1815, cognizance was given to State and county courts, generally, of suits for taxes, duties, fines, penalties, and forfeitures arising under the laws imposing direct taxes and internal duties. 3 Stat. 244.

These instances show the prevalent opinion which existed, that the State courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the State courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general argument. See *United States* v. *Lathrop*, 17 Johns. 4. See, especially, the able dissenting opinion of Mr. Justice Platt, id. 11.

It was, indeed, intimated by Mr. Justice Story, *obiter dictum*, in delivering the opinion of the court in *Martin* v. *Hunter's Lessee*,

1 Wheat. 334–337, that the State courts could not take *direct* cognizance of cases arising under the Constitution, laws, and treaties of the United States, as no such jurisdiction existed before the Constitution was adopted. This is true as to jurisdiction depending on United States authority; but the same jurisdiction existed (at least to a certain extent) under the authority of the States. Inventors had grants of exclusive right to their inventions before the Constitution was adopted, and the State courts had jurisdiction thereof. The change of authority creating the right did not change the nature of the right itself. The assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations, and did not have much influence with the court when a proper case arose for its adjudication. *Houston* v. *Moore*, decided in 1820, 5 Wheat. 1, was such a case. Congress, in 1795, had passed an act for organizing and calling forth the militia, which prescribed the punishment to be inflicted on delinquents, making them liable to pay a certain fine, to be determined and adjudged by *a court-martial*, without specifying what court-martial. The legislature of Pennsylvania also passed a militia law, providing for the organization, training, and calling out the militia, and establishing courts-martial for the trial of delinquents. The law in many respects exactly corresponded with that of the United States, and, as far as it covered the same ground, was for that reason held to be inoperative and void. Houston, a delinquent under the United States law, was tried by a State court-martial; and it was decided that the court had jurisdiction of the offence, having been constituted, in fact, to enforce the laws of the United States which the State legislature had re-enacted. But the decision (which was delivered by Mr. Justice Washington) was based upon the general principle that the State court had jurisdiction of the offence, irrespective of the authority, State or Federal, which created it. Not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts. Justices Story and Johnson dissented; and, perhaps, the court went further, in that case, than it would now. The act of Congress having

instituted courts-martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void. Be this as it may, it was only a question of construction; and the court conceded that Congress had the power to make the jurisdiction of its own courts exclusive.

In *Cohens* v. *Virginia*, 6 Wheat. 415, Chief Justice Marshall demonstrates the necessity of an appellate power in the Federal judiciary to revise the decisions of State courts in cases arising under the Constitution and laws of the United States, in order that the constitutional grant of judicial power, extending it to all such cases, may have full effect. He says, "The propriety of intrusting the construction of the Constitution and laws, made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn in question. It seems to be a corollary from this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the State tribunals. If the Federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States, and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the State courts, however they may be constituted."

See the subject further discussed in 1 Kent's Com. 395, &c., Sergeant on the Const. 268; 2 Story on the Const., sect. 1748, &c.; 1 Curtis's Com., sects. 119, 134, &c.

The case of *Teal* v. *Felton* was a suit brought in the State court of New York against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the Supreme Court and Court of Appeals of New York, and their decision was affirmed by this court. 1 Comst. 537; 12 How. 292. We do not see why this case is not decisive of the very question under consideration.

Without discussing the subject further, it is sufficient to say,

that we hold that the assignee in bankruptcy, under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the State courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case. *Judgment affirmed.*

HENDRICK v. LINDSAY ET AL.

1. It is now the prevailing rule in this country, that a party may maintain assumpsit on a promise not under seal made to another for his benefit.
2. In the absence of any evidence whatever to contradict or vary the case made by the plaintiff, it is not error for the court, when the legal effect of the plaintiff's evidence warrants a verdict for him, to so charge the jury.

ERROR to the Circuit Court of the United States for the Northern District of New York.

In March, 1871, one Ballantine recovered a judgment in the Circuit Court of the United States for the Eastern District of Michigan against the Albany Insurance Company, for $3,425.34 and costs. That company desiring to bring the case to this court upon writ of error, Hendrick, its vice-president, on the 8th of March, 1871, wrote to Lindsay, one of the defendants in error, as follows: —

"A. G. LINDSAY, Esq., Detroit:

"DEAR SIR, — Will you be good enough to sign the needful bail-bond in the 'Park' case, and oblige

"Yours truly, JAMES HENDRICK, V. P."

On the 10th of that month, Lindsay replied: "I beg to say that I will sign the bail-bond in the 'Park' case, if you will first furnish me with sufficient security to indemnify me in case of our defeat; the case may be delayed years at Washington, and many changes may occur in that time."

On the next day Hendrick wrote to Lindsay, acknowledging the receipt of the letter of the 10th, and saying, "Whatever security may be desired in the shape of a personal bond, I will give it to you." After the receipt of this letter, the defendants in error executed to Ballantine their

joint and several bond, which was accepted, approved, and filed on the sixteenth day of March, 1871; whereupon the insurance company sued out a writ of error, by which, and in virtue of the bond, said judgment was superseded.

On the 15th of March, 1871, Hendrick wrote to Lindsay, saying as follows: —

"I have just returned from Boston, and learn that you have not yet advised us of having signed our bail-bond in the 'Park' case. As it should be done at once, I hope you will feel that we have, if nothing more, a feeling of old friendship, that ought to make men of us in an hour of need."

On the 17th, Lindsay replied, —

"Upon receipt of your favor of the 11th inst., I signed your bond in 'Park' case without loss of time, and supposed the fact itself was answer to you in the premises until this A.M. I received yours of the 15th inst., touching on the same subject, and now ask your pardon for not stating to you at once, upon the receipt of your 11th inst. favor, that the bond was executed."

On the 20th, Lindsay again wrote as follows: —

"DEAR SIR, — Enclosed is bond of indemnity, which please have executed and returned to me."

The bond was as follows: —

"Know all men by these presents, that we, James Hendrick, as principal, and , as surety, of Albany, in the State of New York, held and firmly bound unto Archibald G. Lindsay and James P. Mansfield, of the city of Detroit, county of Wayne, and State of Michigan, in the sum of $5,500, lawful money of the United States of America, to be paid to the said Lindsay and Mansfield, or to their certain attorneys, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and each and every of them, firmly by these presents, sealed with our seals, dated the twentieth day of March, 1871.

"The condition of this obligation is such, that, whereas the said Lindsay and Mansfield have lately, at the request of the said Hendrick, signed two bonds, — one in the sum of $5,000, and one in the sum of $200, — in a case pending in the Circuit Court of the United

States for the Eastern District of Michigan, in which suit James M. Ballantine was plaintiff, and the Albany City Insurance Company was defendant, said bonds being filed for the purpose and intent of taking said case to the Supreme Court of the United States.

"Now, therefore, if the said Hendrick shall save and keep the said Lindsay and Mansfield fully indemnified and harmless against all loss, damages, or expenses arising from their giving the said bonds, then the above obligation to be void; and otherwise, in force."

No dissent was expressed by Hendrick, nor was the bond executed by him.

Ballantine's judgment having been affirmed by this court, Lindsay and Mansfield paid it by their negotiable notes, and thereupon brought assumpsit against Hendrick for the amount so paid.

The plaintiffs, after proving the foregoing facts, rested their case. The defendant announced that he had no evidence to offer.

The court charged that the plaintiffs were entitled to recover, and directed the jury to so find; to which charge and direction the defendant excepted.

The jury found a verdict for the plaintiffs; and judgment having been rendered thereon, the defendant sued out this writ of error.

Mr. T. Lawson for the plaintiff in error.

The undertaking of a surety is to be strictly construed, and should not be extended to any other subject, person, or period of time than is expressed in the obligation. Birge on Suretyship, 40; *Birkenhead et al.* v. *George et al.*, 5 Hill (N. Y.), 634; *Barns et al.* v. *Barron*, 61 N. Y. 39; *Miller* v. *Stewart*, 9 Wheat. 703; *Ludlow* v. *Simonds*, 2 Caines's Cas. 1; *Lord Arlington* v. *Merrick*, 3 Saund. 400; *Grant* v. *Naylor*, 4 Cranch, 224; *Bleecker* v. *Hyde*, 3 McLean, 279; *Wright* v. *Russell*, 3 Wils. 530; *Weston et al.* v. *Barton*, 4 Taunt. 726; *Strange et al.* v. *Lee*, 3 East, 484; *Chancellor, &c. of Cambridge* v. *Baldwin*, 5 M. & W. 580; *Day* v. *Davey*, 2 Per. & Dav. 249; *London Assurance Co.* v. *Bold*, 6 Adol. & Ell. N. S. 514.

In order to entitle the plaintiffs to recover, they were bound

to show payment and discharge of the liability or debt. *Bonny* v. *Seeley*, 2 Wend. 482; *Powell* v. *Smith*, 8 Johns. 248.

The giving of one's own note will not, unless it is *expressly* so agreed, operate as payment or discharge of a prior debt or obligation. *The Kimball*, 3 Wall. 37; *Downey, Ex'r*, v. *Hicks, Ex'rx*, 14 How. 240; *Drake* v. *Mitchell*, 3 East, 250; *Tobey* v. *Barber*, 5 Johns. 68; *Johnson* v. *Weed*, 9 id. 309; *Wetherby* v. *Mann*, 11 id. 516; *Van Ostrand* v. *Reed*, 1 Wend. 424.

Mr. Walter H. Smith for the defendants in error.

A party occupying the position of a surety who gives his negotiable note, which is accepted in satisfaction of a debt or obligation, can maintain an action against his principal. *Wetherbee* v. *Mann*, 11 Johns. 518; *Rodman* v. *Hedden*, 10 Wend. 501; *Elwood* v. *Deifendorf*, 5 Barb. 410; *Van Ostrand* v. *Reed*, 1 Wend. 430.

The promise of the plaintiff in error to indemnify, under the circumstances, entitled the defendants in error to maintain their action. *Elwood* v. *Deifendorf*, *supra;* 1 Story's Eq. Jur., sect. 499.

The true construction of the undertaking of the plaintiff in error to indemnify the sureties is to be found in the intention of the parties. *Gates* v. *McKee*, 13 N. Y. 232; *Nash* v. *Towne*, 5 Wall. 699.

Although Mansfield's name was not mentioned in the letters to Hendrick, yet if the promises and undertaking of the latter were intended to inure to the benefit of any person or persons whom Lindsay might procure to sign the bail-bond, then such person or persons can, at common law, sue directly and in his or their own name, in assumpsit. Chitty, Contr. 54–58, and cases cited.

MR. JUSTICE DAVIS delivered the opinion of the court.

There were no disputed facts in this case for the jury to pass upon. After the plaintiffs had rested their case, the counsel for the defendant announced that he had no evidence to offer; and thereupon the court, considering that the legal effect of the evidence warranted a verdict for the plaintiffs, told the jury in an absolute form to find for them. This was correct practice where there was no evidence at all to contradict or

vary the case made by the plaintiffs; and the only question for review here is, whether or not the court mistook the legal effect of the evidence. *Bevans* v. *United States*, 13 Wall. 57; *Walbrun* v. *Babbitt*, 16 id. 577.

It is very clear that the transaction in question constituted a good contract between some parties. The real inquiry is, whether the promise and undertaking of Hendrick were intended to inure to the joint benefit of Lindsay and Mansfield, so as to entitle them to bring an action. In construing letters like those on which this suit is based, the language employed is one, but not the only, element to be considered in arriving at the intention of the writers. In determining the sense in which the words were used, they should be considered in connection with the subject-matter of the correspondence, the situation of the parties, the thing to be done, and the surrounding circumstances.

There is no absolute proof of the relation sustained by Hendrick to the insurance company, other than that he was its vice-president; but from the tenor of the letters it is quite clear that he managed its business in Michigan, and had general authority over it in that State. It is equally clear that Lindsay was only a local agent of the company at Detroit, with the usual powers and duties belonging to such an appointment. Such was the relative position of these persons when it became necessary to take action on Ballantine's judgment against the company in the Circuit Court of the United States at Detroit. Lindsay had no concern with it. The officers of the corporation in Albany were to determine whether to let the judgment remain in force, or to sue out a writ of error from this court. To stay the execution required a bond of considerable amount. It was not necessary that the company should sign it, but it was absolutely essential that the offered security should be satisfactory to the judge whose duty it was to approve the bond. In this state of the case Hendrick wrote to Lindsay, "Will you be good enough to sign the needful bail-bond?" This request, construed literally, would limit the application to Lindsay alone. But this is a narrow construction; and evidently the words could not in this sense have been used by Hendrick or adopted by Lindsay. The request was coex-

tensive with the object to be attained, — that of superseding the judgment and securing a hearing in a higher court; and Hendrick asked Lindsay to see that whatever was required for this purpose should be done. To suppose any thing else is to suppose, that, wishing a certain thing effected, he restricted his agent in the use of the necessary means to accomplish it; for it might turn out that the judge would require two securities instead of one, or that Lindsay would not be accepted at all. Besides, it was immaterial to Hendrick whether the bond was signed by one or more persons, as he promised to give indemnity in the shape of a personal bond. It is true that this promise, in terms, was to Lindsay; but there is no reason why it, any more than the request, should be limited. If the request applied, as we think it did, to the procurement of a sufficient bond, the promise has a like extent. That Lindsay and Mansfield (to whom the correspondence was communicated) understood them to have this effect, is clear enough, from their signing the bond and staying the collection of the judgment. It is also equally clear, from the same fact, that Lindsay requested Mansfield to become one of the sureties, and that they both executed the bond, relying upon the undertaking of Hendrick to furnish the promised indemnity.

This was not done, although prompt application was made to him by letter from Lindsay, enclosing a draft of the indemnity bond. He neither signed nor returned it, nor did he afterwards correspond with any one on the subject. The draft recites that the *supersedeas* bond was executed by Lindsay and Mansfield, at the request of Hendrick. He was, therefore, informed of the interpretation which they put upon his request and promise; and, if it was wrong, he would at least, as an excuse for doing nothing, have availed himself of the occasion to repudiate the whole proceeding. As he did not do this, but retained, without objection, the draft, he in effect adopted that interpretation.

It is argued that Hendrick had no personal interest in the matter, and that, therefore, there was no consideration for his promise. But damage to the promisee constitutes as good a consideration as benefit to the promisor. In *Pillan* v. *Van Mierop*, 3 Burr. 1663, the court say, "Any damage or suspension

of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising." This rule is sustained by a long series of adjudged cases.

It is also argued, as Mansfield's name does not appear in the letters of Hendrick, that he could not join in this action. This would be true, if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country. 1 Pars. Contr. (6th ed.) 467, and cases cited. If Hendrick engaged with Lindsay to indemnify the sureties furnished by him, and on the faith of this promise Lindsay and Mansfield executed the *supersedeas* bond, as we hold was the case here, then, if they suffered loss by reason of the breach of this contract, they are entitled to maintain this suit. That they did suffer loss, to the extent of Ballantine's judgment against the company, which was affirmed in this court, is the legal effect of the evidence of the only witness on the point. He states directly that he and his co-plaintiff paid on the bond to Ballantine a certain amount of money, meaning, evidently, on the judgment to secure which the bond was given. It is true he says, "We did not pay cash," "we paid it in our notes;" but negotiable promissory notes are equivalent to the payment of money, if received by the creditor in satisfaction of the judgment, though such satisfaction be not entered on the record. The witness, through all his testimony, speaks of what he did as payment; and the true inference from the whole of it is, that Ballantine treated these notes as so much money paid him. There was no reason why he should not; for the bond was his only reliance, and the enforced collection of it would have occasioned expense and required time. It was far better for him, if the obligors were good (and this is the presumption), but unable to pay at once, to take time-notes in liquidation of the demand, than to bring suit on the bond. Besides, this is not an unusual way of closing up such a transaction, where the circumstances surrounding it appeal so strongly to the indulgence of the creditor.

On the whole, we are of the opinion that the court below did not mistake the legal effect of the uncontradicted testimony in the case, and that there was no error in instructing the jury to find for the plaintiffs. *Judgment affirmed.*

O'HARA ET AL. *v.* MACCONNELL ET AL., ASSIGNEES.

1. A decree in chancery will be reversed if rendered against a woman who is shown by the bill to be both a minor and *feme covert*, where no appearance by or for her has been entered, and no guardian *ad litem* appointed.
2. It is error to render a final decree for want of appearance at the first term after service of subpœna (Equity Rules, 18, 19), unless another rule-day has intervened.
3. Where the object is to divest a *feme covert* or minor of an interest in real estate, the title of which is in a trustee for her use, the trust being an active one, it is error to decree against her without making the trustee a party to the suit.
4. The making of the conveyance, as ordered by the decree, does not deprive the defendant of the right of appeal.
5. Neither a subsequent petition in the nature of a bill of review, nor any thing set up in the answer to such petition on which no action was had by the court, can prevent a party from appealing from the original decree.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. J. W. Kirker* for the appellants. No counsel appeared for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

Michael O'Hara was adjudged a bankrupt Dec. 9, 1867, and the appellees duly appointed assignees, to whom an assignment of his effects was made in due form. As such assignees, they filed in the Circuit Court for the Western District of Pennsylvania the bill in chancery on which the decree was rendered from which the present appeal is taken. The bill alleges that a conveyance of certain real estate made by said O'Hara and his wife, Frances, on the tenth day of July, 1866, to William Harrison and G. L. B. Fetterman, in trust for the use of the wife, was a fraud upon creditors, and prays that the deed be

declared void, and that O'Hara, his wife, and Barr, her guardian, be decreed to convey the land to complainants, that they may sell it for the benefit of O'Hara's creditors, free from the embarrassment created by said deed of trust.

The bill also alleges that Mrs. O'Hara is a minor, and that A. M. Barr is her legal guardian.

A subpœna was issued on the fifth day of April, 1869, and served on the 7th, on O'Hara, for himself and wife, and on Barr; and on the seventh day of May following, without appearance, and without answer by any defendant, the bill was amended, was taken as confessed, and a final decree rendered. This decree enjoined the defendants from setting up any claim to the land, and ordered all of them to convey and release the same to the assignees; and, in default of such conveyance within thirty days, Henry Sproul was appointed commissioner to do it in their name. A copy of this decree was served on the defendants May 10; and on the 14th of June the order was complied with, by a deed made by O'Hara, his wife, and Barr, which on its face purports to be in execution of the order, and for the consideration of one dollar. It will thus be seen, that within less than five weeks from the filing of the bill, and without any actual service of the writ or other notice on her, a decree was entered against a woman who was both a minor and a *feme covert*, without the appointment of a guardian *ad litem*, without any appearance by her or for her, depriving her of fourteen acres of land now within the limits of the city of Pittsburg. It is from this decree that she appeals.

By the thirteenth rule of practice of the courts of equity of the United States, as it stood when the subpœna in this case was served, a delivery of a copy to the husband was good, where husband and wife were sued together; but the rule was amended by this court in 1874, so as to require a personal service on each defendant, or by leaving a copy for each at his or her usual place of abode, with some adult member of the family. The service in the present case would not now be good, though it must be held to have been so at the time it was made.

It would be very strange if a decree obtained under such

circumstances could stand the test of a critical examination. We are of opinion that there are several errors sufficient to justify its reversal.

1. It was the duty of the court, where the bill on its face showed that the party whose interest was the principal one to be affected by the decree was both a minor and a *feme covert*, and that no one appeared for her in any manner to protect her interest, to have appointed a guardian *ad litem* for that purpose. If neither her husband nor he who is styled her guardian in the bill appeared to defend her interest, it was the more imperative that the court should have appointed some one to do it. There is no evidence in the record, except the statement in the bill, that Dr. Barr was her guardian. If he was not, then there was no one served with notice, whose legal duty it was to defend her. If he was her guardian, there is no evidence of the precise nature of his duties or power, as there are several classes of guardians. As to the particular property now in contest, she had a trustee, in whom the title was vested for her use, and whose duty it would have been to protect her interest in it; but, strangely enough, he was not made a party. It was, therefore, error in the court to proceed to a decree without appointing a guardian *ad litem*. 1 Daniell's Ch. Pr. 160, c. 4, sect. 9; *Coughlin's Heirs* v. *Brents*, 1 McLean, 175; *Lessee of Nelson* v. *Moore*, 3 id. 321.

2. If Mrs. O'Hara had been under no disability, it was error to have entered a final decree for want of appearance on the return day of the writ, or during that term.

"According to the practice of the English Chancery Court," says Mr. Justice Washington, in *Pendleton* v. *Evans's Ex'r*, 4 Wash. C. C. 337, "a bill cannot be taken *pro confesso* after service of subpœna, and even after appearance, until all the processes of contempt to a sequestration have been exhausted; after which the bill is taken *pro confesso*, and a decree passes which is absolute in the first instance." He then comments on the practice of the New York Chancery Court, which, instead of a proceeding in contempt, required a rule to answer to be served on the defendant; and, if this was not obeyed, the bill might be then taken *pro confesso*. He then adds: "The principle which governs the practice in both these courts is, that

the defendant shall not be taken by surprise, but shall have sufficient warning before a decree is entered against him by default." He then states the practice by the rules adopted by the Supreme Court for the Federal courts, as follows: "If the answer, the subpœna being returned executed, be not filed within three months after the day of appearance and bill filed, then defendant is to be ruled to answer, and, failing to do so, the bill may be taken for confessed, and the matter thereof decreed immediately; but this decree is only *nisi*, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause to the contrary be shown." And in the case of *Read* v. *Consequa*, 4 Wash. C. C. 180, where a bill on which an injunction had been allowed had remained unanswered, and without appearance of defendant, who had been duly served five years before, he refused to grant an order taking the bill *pro confesso* because it would be irregular.

What a contrast to the speed with which the decree was entered in the case before us!

Rules 18 and 19 of the equity practice as now existing have modified those which are mentioned by Judge Washington, and, unless the defendant demur, plead, or answer, on or before the rule-day *next succeeding his appearance*, the plaintiff may enter an order in the order-book that the bill be taken *pro confesso*, and the matter thereof decreed at the *next* succeeding term. But in the case before us the final decree was entered on the day fixed for appearance, or, at most, at the same term.

The standing rule now requires defendant to plead by the next rule-day after appearance, which is the same as if a special rule were taken on him to do so.

It is, therefore, clear that final decree could not be made, even under the present rules, until the term of the court next succeeding the day of default.

The remarks of Mr. Justice Washington show that these rules are not merely technical and arbitrary, but are made to prevent a defendant from losing his rights by surprise.

3. The legal title to the property in question was held by Fetterman, in trust for Mrs. O'Hara. The trust was not a

naked or dry trust; for he was empowered, with her consent, to sell it, and reinvest the proceeds on the same trusts, or to mortgage it, and with the money so raised purchase other real estate.

How the decree can clear the property of this trust without having the trustee before the court it is difficult to see. This was the object of the suit; but how can it be made effectual for that purpose in the absence of the person in whom the title is vested?

We think that, in a case like this, where a woman, under the double disability of coverture and infancy, has a trustee in whom the title of the property in controversy is vested for her use, the court should have refused a decree until he was made a party.

It is said, that, after making the deed which the court ordered, the appellant is bound by it, and cannot now prosecute this appeal.

The principle is unsound. The deed recites on its face that it is made under the order of the court. The parties must either have obeyed the order of the court, or taken an appeal and given a *supersedeas* bond in a sum so large that they were probably unable to do it.

"In no instance within our knowledge," says the court, in *Erwin* v. *Lowry*, 7 How. 184, "has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the court to restore the parties to their rights." That was a case where the appellant received the money which by the decree he recovered of the appellee, and is, therefore, a stronger case than the present, as his action would seem to ratify the decree.

About three years after this decree, appellants filed a petition in the Circuit Court in the nature of a bill of review to set it aside. To this petition the appellees filed an answer, in which, among other matters, they set out a copy of another deed made by O'Hara and wife the day after (as they allege) Mrs. O'Hara became of age, and they rely on that deed here as a bar to the appeal.

It is sufficient now to say, as to that deed, that it is long subsequent to the decree, and apart from it. Its validity and force must stand or fall on its own merits, wherever and whenever they may be tried, in any issue made on them. It has nothing to do with the appeal which regards the errors of the decree, and which the appellant has a right to have reversed. When this is done, and she is placed where she ought to be in that regard, the effect of the deed now under consideration may, perhaps, be decided on a supplemental bill, setting it up as matter occurring since the commencement of the suit, or by the appellees dismissing their present suit and relying on the title acquired by that deed.

Another equally conclusive reason why we cannot consider any other matters arising under the petition and answer is, that there is no order, decree, or other action of the court on them. The record closes with the bill and answer, the latter filed May 23, 1874, and the present appeal allowed Aug. 4, 1874.

We, therefore, take no notice of this subsequent pleading, but reverse the original decree, and remand the case to the Circuit Court for such further proceedings as to right and justice may appertain. *Decree reversed.*

KERRISON, ASSIGNEE, v. STEWART ET AL.

Where a trustee is invested with such powers and subjected to such obligations that his beneficiaries are bound by what is done against him or by him, they are not necessary parties to a suit against him by a stranger to defeat the trust in whole or in part. In such case, he is in court on their behalf; and they, though not parties, are concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

Edwin L. Kerrison and Herman Leiding, of Charleston, S. C., May 1, 1867, conveyed to Charles Kerrison, in trust, the real estate in controversy in this suit, by deed, the material parts of which are as follows: —

"This deed of two parts, made this first day of May, in the year of our Lord one thousand eight hundred and sixty-seven, between Edwin L. Kerrison and Herman Leiding, of the city of Charleston, in the State aforesaid, lately trading together as merchants, copartners, under the name and style of Kerrison & Leiding, of the first part, and Charles Kerrison, also formerly merchant, of the same place, of the second part, witnesseth: That whereas, with a view to enable them, the said Kerrison & Leiding, parties hereto of the first part, to resume some mercantile trade or business, a majority of their creditors, both in number and amount or value, have agreed to take their notes, dated the first day of December last, payable, with interest, from the first day of June, that was in A.D. 1865, two and three years after the said date, secured by a conveyance to an approved trustee of the real estate hereinafter fully and particularly mentioned and described, and intended to be conveyed to the said Charles Kerrison, hereto of the second part, in trust, for the better securing of the said notes, a schedule whereof, with the names of the said creditors and the respective amounts of the notes given to each of them, all bearing the date and payable on the days aforesaid, is hereunto annexed and made a part of these presents; and whereas all other the creditors of the said Kerrison & Leiding may be disposed to come in upon the footing of the said agreement and security, and in that event it is intended to secure to them that right, and also to provide for making the security more effectual.

"Now this deed further witnesseth, That the said Edwin L. Kerrison and Herman Leiding, . . . for the better securing their said notes, and such as may be given to their other creditors, . . . have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Charles Kerrison [here follows the description of all the property]. To have and to hold all and singular the premises unto the said Charles Kerrison, his heirs and assigns for ever, . . . in trust, nevertheless, in the first place, to hold the said premises as a security for the several and respective parties, creditors of the said Kerrison & Leiding, named in the first section of the schedule hereunto annexed, for the several and respective sums set opposite to their names, with interest, as above recited; and also for such other parties, creditors of the said Kerrison & Leiding, the names of which are, as is believed and intended, to be correctly stated in the second section of the said schedule hereto annexed, who, at any time before the first day of December next, in lieu and satisfaction of their claim,

shall take and accept the notes of the said Kerrison & Leiding, bearing the same date, 1st December, 1866, payable at the same time (two and three years after date), with interest from the same (1st June, 1865), each note for one-half the principal due such creditors as the creditors named in the first section of the said schedule have taken and accepted; and thereupon the proper amount shall be set opposite the names of the said creditors named in the second section of the said schedule: and, in the next place, in trust, unless the said notes be paid by the parties hereto of the first part in the mean time, then at public or private sale to sell and dispose of all and singular the premises aforesaid, or so much thereof as may be necessary, or to raise the sum required by mortgage (if practicable), in due time, to provide for the payment of the said notes as they shall fall due, together with all proper charges, expenses, and commissions to be allowed to the said Charles Kerrison, which commissions shall not exceed five per cent upon the amount of sales or sums raised by mortgage. Or if he, the said Charles Kerrison, should deem it best for the interest of all, then to sell and dispose of the said premises, or any part of them, at any time after the execution and delivery of these presents, as he may think proper, for cash, or on such credit as may enable him to meet the said notes at maturity; and if he should so sell for cash, or for cash and credit, before the maturity of the said notes, then, after paying and retaining all proper charges, expenses, and commissions, to pay the clear residue of the cash so received by him to the parties or holders of the said notes in average and proportion to the several and respective amounts due upon the said notes, if the cash be not sufficient to pay the whole thereof, and in the same way to pay the proceeds of sale of the whole property (less charges, commissions, and expenses) *pro rata*, if the whole be not sufficient to pay the said notes in full at their maturity."

A. T. Stewart & Co. were named as creditors in the second schedule; but they declined to accept under the trust. Paton & Co. were named in the first schedule, and Benkard & Hutton in the second.

On Aug. 8, 1866, and before the execution of the deed of trust, Stewart & Co. sued out a summons, entitled "Sixth Circuit of the United States of America, South Carolina District," and tested by the Chief Justice of the United States, at Greenville, South Carolina, commanding the marshal of the United States for that district to summon Edwin L. Kerrison and Her-

man Leiding to appear before the clerk of the Circuit Court of the United States for the aforesaid circuit and district, at the rules to be holden at Charleston, in the aforesaid district, on the first Monday in September next, to answer, &c. The writ was signed by the clerk of the Circuit Court for the district of South Carolina, and sealed. At the day named, Kerrison & Leiding, by their attorneys, entered their appearance to the suit, before the clerk. Stewart & Co. then filed their declaration, containing several counts; to a part of which Kerrison & Leiding demurred, and to others they pleaded specially. They also pleaded the general issue. Stewart & Co. demurred to the special pleas, and the cause was placed upon the docket of the Circuit Court. At a regular term of the Circuit Court, holden at Charleston in June and July, 1867, the demurrers to the declaration were overruled, and those to the special pleas sustained. The cause then standing for trial upon the general issue, was continued. In the following August, the docket of the Circuit Court was taken to Greenville, at which place, on the first Monday in that month, a regular term of the District Court for the Western District of South Carolina was held, that court having circuit-court jurisdiction and powers in that part of the district of South Carolina embraced within the western district. Before the term, the attorneys of Stewart & Co. notified the attorneys of Kerrison & Leiding that they should insist upon the trial of the cause at that term and place. Accordingly, the parties appeared, and upon the regular call of the docket a trial was had. The case was argued by counsel on both sides, without objection to the jurisdiction. A verdict having been rendered by the jury in favor of Stewart & Co., judgment was in due form entered thereon, Sept. 24, 1868. Execution was issued upon the judgment, and returned *nulla bona;* whereupon Stewart & Co. filed their bill in equity in the Court of Common Pleas for the county of Charleston, a State court of South Carolina, against Edwin L. Kerrison, Herman Leiding, Charles Kerrison, Paton & Co., and Hutton (the last two as representative creditors), praying that the deed of trust to Charles Kerrison might be adjudged void as to them, and that the property covered by it might be subjected to the payment of their judgment. The Kerrisons and Leiding appeared and defended the suit. Publi-

cation was made to bring in Paton & Co. and Hutton, who were non-residents of the State; but they did not appear, or make defence. The Court of Common Pleas, June 22, 1870, after hearing, adjudged the deed to be void as to Stewart & Co. From this decree the Kerrisons and Leiding appealed to the Supreme Court of the State, where it was affirmed, March 1, 1872.

Kerrison & Leiding were adjudged bankrupts upon their own petition, April 6, 1872, and afterwards Charles Kerrison was duly appointed and qualified as their assignee. This bill was filed by him, as such assignee, in the Circuit Court for the district of South Carolina, against Stewart & Co., and the creditors provided for in the trust deed, to adjust the liens upon the property, with a view to a sale and distribution of the proceeds under the direction of the court. Stewart & Co. answered, claiming a prior lien under the operation of their judgment and the decree of the State court in their favor; and they insist that the creditors are bound by that decree. The creditors answered, alleging that the judgment in favor of Stewart & Co. was void for want of jurisdiction in the court in which it was rendered; or, if not void, that it is invalid as to them, by reason of certain irregularities in the proceedings previous to and at the time of its rendition, and that, as they were not parties to the suit in the State court, they are not bound by the decree.

The Circuit Court sustained the prior lien of Stewart & Co., and decreed accordingly. From this decree the creditors and the assignee in bankruptcy appeal to this court.

Submitted on printed arguments by *Mr. Edward McCrady, Jr.*, for the appellant, and by *Mr. Samuel Lord, Jr.*, for the appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The first question to be considered in this case is, whether the creditors of Kerrison & Leiding, who claim the benefit of the trust created by the deed to Charles Kerrison, are concluded by the decree against him in the State court. If they are, the decree of the Circuit Court must be affirmed.

It cannot be doubted, that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust (*Shaw* v. *Norfolk Co. R. R. Co.*, 5 Gray, 171; *Bifield* v. *Taylor*, 1 Beat. 91; *Campbell* v. *R. R. Co.*, 1 Woods, 376; *Ashton* v. *Atlantic Bank*, 3 Allen, 220); or to one by a stranger against him to defeat it in whole or in part. *Rogers* v. *Rogers*, 3 Paige, 379; *Wakeman* v. *Grover*, 4 id. 34; *Winslow* v. *M. & P. R. R. Co.*, 4 Minn. 317; *Campbell* v. *Watson*, 8 Ohio, 500. In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party.

The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience.

Undoubtedly cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustee to represent their interests. They then become proper parties, and may be brought in or not, as the court in the exercise of its judicial discretion may determine. But this was very clearly not a case in which such action was required; and so all the parties evidently thought, while the litigation was progressing. The trustee, as well as Kerrison & Leiding, appeared, and vigorously resisted the decree asked for. The report of the case in 3 Rich. (S. C.) N. S. 266, to which we

have been referred, shows that they were represented by the same counsel who appear here for the creditors, that the argument was full, and the judgment carefully considered. In addition to this, Paton & Co. and Hutton, who are among the creditors now resisting the decree, were named as parties to the suit, and might have appeared to defend, if they had been so inclined. They seem, however, to have been then content to leave their interests in the hands of the trustee, who certainly could present their defence if he would, and against whom no charge of neglect even is now made.

It remains to determine whether Charles Kerrison was authorized to represent the creditors in proceedings against him to defeat the title he held for their security. This depends upon the intention of the parties, as expressed in the deed creating the trust and making him the trustee. Looking to that, we find that he was the "approved trustee," provided for in the arrangement between Kerrison & Leiding and the majority of their creditors, which was the foundation of the trust. He was to "hold the premises" as security for the scheduled creditors who had already accepted the terms proposed, and also for such of certain other creditors named in a second schedule as should thereafter accept. If the debts so secured were not paid by Kerrison & Leiding, it was made his duty to provide the means for their payment, as well as the payment of all proper charges and expenses, either by a public or private sale of the property, or by mortgage, if practicable. If he should deem it best for the interest of all, he was authorized to sell the whole or any part of the property at any time for cash, or on such credit as would enable him to meet the debts at maturity; but if he did sell before maturity, the cash received, after deducting all proper charges, &c., was to be divided amongst the creditors in proportion to the amounts due them respectively.

From this it appears that he was not only invested with the legal title to the property, but that all parties relied upon his judgment and discretion for the protection of their respective interests. A clear intent is manifested of relieving the creditors from the necessity of looking personally to the conversion of the securities, or to the preservation of the trust. While the trustee is nowhere in express terms invested with the

power to give receipts for purchase-money upon sales made, it is perfectly apparent that such must have been the intention of the parties. The wide range of discretion allowed him in making the security available for the payment of the debts is entirely inconsistent with the idea that purchasers or mortgagees must look to the application of their moneys after payment actually made to him. The creditors cannot interfere with his discretion in making sales, so long as he keeps within the general scope of his powers; neither can they prescribe the terms upon which he shall sell. In all these particulars he has been authorized to act in such manner as he shall deem best for the interests of both parties, debtors as well as creditors. The debtors rely upon his judgment to avoid unnecessary sacrifice; and the creditors must be satisfied, if, at the proper time, he is found to have done all that could reasonably be required of him to subject the securities to the payment of their several demands.

With these facts before us, it is impossible to come to any other conclusion than that, as to strangers, he did represent the trust and its property. Purchasers must go to him to make their purchases, and adverse claimants may properly look to him as the party against whom alone they are called upon to assert their rights. If the creditors, mindful of their interests, are dissatisfied with the manner in which he represents them in suits that are pending, they may, under proper circumstances, intervene, and ask to be made parties, so as to speak for themselves; but their adversary need not go after them, except under the direction of the court.

There is no need of inquiring whether this was a case in which one of the creditors might be brought in and made to represent all; for the trustee is himself the chosen representative of all, and whatever binds him must bind them.

It follows that the creditors are concluded by the decree of the State court; and that necessarily disposes of this case, without further inquiry as to the other important questions argued before us. The object of the suit in that court was to avoid the deed to Charles Kerrison, as against the judgment of Stewart & Co.; and the decree was in accordance with the prayer of the bill. The validity of the judgment was necessarily

involved in the suit; and the decree, as rendered, could not have been given except by establishing it. This is expressly admitted by the creditors in their answer to this bill; for they say, "That the said decrees were given upon the allegation of the bill of complaint of the said A. T. Stewart & Co., among which was the material allegation, without which his said complaint could not have been sustained, that they, the said A. T. Stewart & Co., had recovered, and at the time of their bill filed had, a judgment in this honorable court, upon which they had sued out an execution of *fieri facias*," &c.

Decree affirmed.

TILTON ET AL. v. COFIELD ET AL.

1. Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others.
2. A court of equity cannot act as a court of review, and correct errors of a court of law, nor can it, in the absence of fraud, collaterally question the conclusiveness of a judgment at law.
3. A purchaser of property *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto.

APPEAL from the Supreme Court of the Territory of Colorado.

Argued by *Mr. George T. Curtis* and *Mr. George H. Williams* for the appellants, and submitted on printed arguments by *Mr. Amos Steck* for the appellees.

MR. JUSTICE SWAYNE delivered the opinion of the court.

On the 28th of August, 1865, the appellants sued out of the District Court of Arapaho County, Col., a writ of attachment against the property of Judson H. Dudley and Thomas P. Ames, for the sum of $2,591.44. The indebtedness was stated in the affidavit to be upon an account for goods sold and delivered. On the same day, the writ was served by attaching the real estate in controversy. A declaration was duly filed. The damages were laid at $3,000. On the 27th of January, 1865, judgment was rendered for $2,591.44, and costs. This judgment was reversed by the Supreme Court of the Territory on the 10th

of February, 1868. On the 9th of March, 1867, Dudley, by Charles G. Cheever, his attorney, conveyed a large amount of property, including all that attached under the writ of appellants, to David Moffit, except two lots, which Dudley himself conveyed to the Hallecks. The other appellees derive their title from Moffit. The power of attorney to Cheever was so far defective, that only an equity was vested in Moffit, and nothing more passed to those holding under him. On the 12th of September, 1868, the Tiltons, by leave of the court, filed in the attachment suit an amended affidavit and declaration, whereby were included, as a demand in favor of the plaintiffs, a promissory note executed to them by Dudley and Ames, dated Sept. 19, 1864, for $2,592.90, and bearing interest at the rate of two per cent per month, until paid. This note was given to balance the account set forth in the prior proceedings, and represented the same debt. On the 1st of November, 1869, judgment was rendered against Dudley by confession for $5,652.80, and an order was made for the sale of the property attached. Pursuant to this order, the sheriff sold the attached property at public vendue to the appellants for the sum of $6,345.25, and on the 13th of December, 1871, executed a deed to them.

The appellees filed a bill and supplemental bill, seeking to vacate the sale and annul the conveyance by the sheriff. The court decreed that the order of sale and the proceedings thereon touching the premises were nullities; that the sheriff's deed to the appellants was void; that the property should be for ever discharged from the lien of the judgment; and that the Tiltons should be perpetually enjoined from intermeddling with or selling it.

The record discloses no ground for any imputation of fraud against the appellants. The good faith of the account, the validity of the note, and the propriety of the amount for which the judgment was recovered, as between the parties to attachment proceedings, are not controverted. The original demand was an honest one, arising in the regular course of commercial dealings. The appellants are *bona fide* creditors, and have simply pursued the appropriate means for the collection of what was owing to them. Fraud is not an element in the contro-

versy. The case requires no further consideration in this aspect.

Nor is it denied that the court by which the judgment in the attachment was rendered had full jurisdiction.

In *Voorhes* v. *The Bank of the United States*, 10 Pet. 449, the defendant in an action of ejectment was the defendant in error. He claimed title from certain proceedings in attachment in Ohio. The following objections were taken to them: 1. No affidavit, as required by the statute, was found filed with the clerk; and the law provided, that, if this were not done, the writ should be quashed on motion. 2. Three months' notice of the attachment was to be given in a newspaper, and fifteen days' notice was to be given by the auditors. It did not appear that either had been done. 3. The defendant was to be called three times, and his defaults recorded. No such record appeared to have been made. 4. The auditors were not to sell until after twelve months. It did not appear when the sale was made. 5. The return showed a sale to Foster and Woodward; the deed was made to Stanley, and no connection between them appeared in the record.

The court there being competent to take jurisdiction, and having acquired jurisdiction by the seizure of the property, this court held that all its acts and orders made during the progress of the case were beyond the reach of collateral inquiry, and could be assailed only in a direct proceeding had for that purpose before a competent tribunal.

In *Grignon's Lessee* v. *Astor*, 2 How. 341, the controversy grew out of a license given by the County Court to sell the property of a deceased person. This court applied the same principles. It was said, —

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and, whether they existed or not, is wholly immaterial, if no appeal is taken. The rule is the same, whether the law gives an appeal or not. If none is given from the decree, it is conclusive on all whom it concerns. . . . A purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind; if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave

them the power to hear and determine the case before them, — the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error."

The lines which separate what is void from what is erroneous is clearly drawn in the former case.

The eighth section of the local statute under which the appellants' suit was instituted, declares, —

"No writ of attachment shall be quashed nor the property taken thereon restored, any garnishee discharged, nor any bond by him given cancelled, nor any rule entered against the sheriff discharged on account of any insufficiency of the original affidavit, writ of attachment, or attachment bond, if the plaintiff, or some credible person for him, shall cause a legal and sufficient affidavit or attachment bond to be filed or the writ to be amended in such time or manner as the court in their discretion shall direct; and in that case the cause shall proceed as if such proceedings had been originally sufficient."

The amendments here in question were all within the equity, if not the letter, of this section. The act provides for the amendment of the writ. No such amendment was made. The grasp of the process was confined to the property originally attached. No attempt was made to reach any other. The description of the cause of action was changed, but in the view of equity, and in point of fact, it was substantially the same with that originally described. Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse, rests in the discretion of the court; and the result in either case is not assignable for error. This subject was fully examined in *Tiernan's Executors* v. *Woodruff*, 5 McLean, 135. It is there shown, that both in the English and American courts amendments have been allowed in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action. This was going further than the court went in permitting the amendments made by the appellants. It has also been held, upon full consideration, that "courts have the power to amend their process and records, notwithstanding such amendment may affect existing rights." *Greene* v. *Cole*, 13 Ired. Law, 425.

Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. Cases of this kind, too numerous to be cited, may be found, in which amendments in the most important particulars were permitted to be made. We refer to some of these adjudications: *McKnight* v. *Strong*, 25 Ark. 212; *Talcott* v. *Rosenbury*, 8 Abb. Pr. N. S. 287; *Vanderheyden* v. *Gary*, 3 How. Pr. 367; *Tully* v. *Herrin*, 44 Miss. 627; *Wadsworth* v. *Cheeney*, 13 Iowa, 576; *Jackson* v. *Stanley*, 2 Ala. 326; *Winkle* v. *Stevens*, 9 Iowa, 264; *Wood* v. *Squires*, 28 Mo. 397; *Scott* v. *Macy*, 3 Ala. 250; *Johnson* v. *Huntington*, 13 Conn. 47.

If the amendments objected to by the appellees were improperly allowed, it was at most only an error, and in no wise affected the judgment while unreversed, or the validity of the order of sale, or of the sale and conveyance made under them, to the appellants. They have a perfect legal title, unless it is overcome by the case made in the record by the complainants.

We have already held that there was no fraud on the part of the Tiltons. A case more free from that vice can hardly be imagined. This takes away the jurisdictional foundation of the complainants' case. In the absence of fraud, a court of equity cannot collaterally question the conclusiveness of a judgment at law.

Nor can a court of equity turn itself into a court of review, and correct the errors of a court of law. This is alien to its jurisdiction, and beyond the sphere of its power and duties. *Cameron* v. *Bell*, 2 Dana, 328; *De Rymer* v. *Cantellow*, 2 I. C. 85; *Shollenkirk* v. *Wheeler*, 3 id. 275. As well might a court of law undertake to perform a like function with respect to a court of equity. Each is independent of the other. They act on different principles, and, except where some recognized ground of equity jurisdiction is concerned, are each alike bound to recognize the validity and conclusiveness of the record of what the other has done. Equity in such cases does not contradict, but supplements. It does in this way what right and justice require, and what, from the inflexibility of the principles upon which a court of law proceeds, it could not do. Any thing touching the amendments out of which this controversy

has grown were no more open to inquiry in a court of equity than in another and independent legal forum.

The decree below in this respect involved a usurpation and the invasion of a domain, upon which the court had no right to enter. There being no fraud, neither the judgment nor any thing which preceded or followed it could be properly made the subject of review by that tribunal.

The authorities to which we have referred are conclusive upon the subject.

There is another objection to the case of the appellees, which must not be overlooked. They are not subsequent attaching creditors, nor creditors at all; they are purchasers *lite pendente.* The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. *Inloe's Lessee* v. *Harvey*, 11 Md. 524; *Salsbury* v. *Benton*, 7 Lans. 352; *Harrington* v. *Slade*, 19 Barb. S. C. 162; 1 Story's Eq., sect. 406. The appellees voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment, and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made, and of every thing else, not *coram non judice*, the court might see fit to do in the case. The attachment might be discharged, or the judgment might be larger than was then anticipated. They took the chances, and must abide the result. Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs and circumscribed the jurisdiction of the court. Such is not the law. After their purchase, the court, the parties, and the *res*, stood in all respects as they stood before; and the judgment, sale, and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence.

In some of the States, peculiar systems of jurisprudence, with respect to suits in attachment, have grown up, and every thing in that connection is held to be *stricti juris.* In other States, more liberal rules prevail. We do not mean to contravene the

former. In cases arising in such States, we should be bound to apply the local law. In the Territory where this controversy arose, it does not appear that any system touching the subject is yet established. We have, therefore, felt at liberty to apply general principles to the case in hand.

Decree reversed, and case remanded with directions to dismiss the bill.

FRENCH v. FYAN ET AL.

1. The act of Sept. 28, 1850 (9 Stat. 519), granting swamp-lands, makes it the duty of the Secretary of the Interior to identify them, make lists thereof, and cause patents to be issued therefor. *Held*, that a patent so issued cannot be impeached in an action at law, by showing that the land which it conveys was not in fact swamp and overflowed land.
2. *Railroad Company* v. *Smith*, 9 Wall. 95, examined, and held not to conflict with this principle.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

Argued by *Mr. D. T. Jewett* for the plaintiff in error, and by *Mr. Montgomery Blair* for the defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This action of ejectment was tried by the court below without a jury, by agreement of the parties; and the only finding made by the court was a general one in favor of defendant, on which judgment was rendered in bar of the action.

The single question in this case is raised on the refusal of the court to receive oral testimony to impeach the validity of a patent issued by the United States to the State of Missouri for the land in question, under the act of 1850, known as the "swamp-land grant," the purpose being to show by such testimony that it was not in point of fact swamp-land within the meaning of that act.

The bill of exceptions shows that the land was certified, in March, 1854, to the Missouri Pacific Railroad Company, as part of the land granted to aid in the construction of said road by the act of June 10, 1852; and the plaintiff, by purchase

made in 1872, became vested with such title as this certificate gave.

To overcome this *prima facie* case, defendant gave in evidence the patent issued to Missouri, in 1857, under the swamp-land act, and it was admitted that defendant had a regular chain of title under this patent.

It was at this stage of the proceeding that the plaintiff offered to prove, in rebuttal, by witnesses who had known the character of the land in dispute since 1849 till the time of trial, that the land in dispute was not swamp and overflowed land, made unfit thereby for cultivation, and that the greater part thereof is not and never has been, since 1849, wet and unfit for cultivation.

But the court ruled, that, since the defendant had introduced a patent from the United States to the State for the said land under the act of Sept. 28, 1850, as swamp-land, this concluded the question, and the court, therefore, rejected said parol testimony; to which ruling of the court the plaintiff then and there excepted.

This court has decided more than once that the swamp-land act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp-lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri, for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State, under the act of 1850. For while the title under the swamp-land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards, there can be no claim of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company.

The only question that remains to be considered, is, whether, in an action at law in which these evidences of title come in

conflict, parol testimony can be received to show that the land in controversy was never swamp-land, and, therefore, the patent issued to the State under that act is void.

The second section of the swamp-land act declares, "That it shall be the duty of the Secretary of the Interior, as soon as practicable after the passage of this act, to make out an accurate list and plats of the land described as aforesaid, and transmit the same to the governor of the State, and, at the request of the governor, cause a patent to be issued to the State therefor, and on that patent the fee-simple to said lands shall vest in said State, subject to the disposal of the legislature thereof." It was under the power conferred by this section that the patent was issued under which defendant holds the land. We are of opinion that this section devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling.

We have so often commented in this court on the conclusive nature and effect of such a decision when made and evidenced by the issuance of a patent, that we can do no better than to repeat what was said in the case of *Johnson* v. *Towsley*, 13 Wall. 72, where the whole question was reviewed both on principle and authority. In that case, it had been strongly argued that the specific language of one of the statutes concerning pre-emption on the public lands made the decision of the Commissioner of the General Land-Office conclusive everywhere and under all circumstances. The court responded to this argument in this language: —

"But while we find no support to the proposition of the counsel for plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine, that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclu-

sive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the government have been corrected or declared void, or other relief granted."

We see nothing in the case before us to take it out of the operation of that rule; and we are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.

The learned judge of this court, who presides in the California circuit, has called our attention to a series of decisions of the Supreme Court of that State in regard to this swamp-land grant, commencing with 27 California Reports, 87, in which a different doctrine is announced. But with all the respect we have for that learned court, we are unable to concur in the views therein expressed. The principle we have laid down is in harmony with the system which governs the relations of the courts to the officers of the executive departments, especially those having charge of the public lands, as we have repeatedly decided, and we must abide by them.

We do not mean to affirm that there is any thing in the case before us, as it is here presented, which would justify a resort

to a court of chancery; we merely mean to express our conviction, that the only mode by which the conclusive effect of the patent in this case can be avoided, if it can be done at all, is by a resort to the equitable jurisdiction of the courts.

The case of *Railroad Company* v. *Smith*, 9 Wall. 95, is relied on as justifying the offer of parol testimony in the one before us. In that case, it was held that parol evidence was competent to prove that a particular piece of land was swamp-land, within the meaning of the act of Congress.

But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. The court said, "The matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before *the court whose duty it became, because the secretary had failed to do it*, this was clearly the best evidence to be had, and was sufficient for the purpose." There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp-land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the secretary to perform his duty. *Gaines* v. *Thompson*, 7 Wall. 347; *Secretary* v. *McGarrahan*, 9 id. 298; *Litchfield* v. *The Register and Receiver*, id. 575.

There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the secretary had made any decision, the evidence would have been excluded. *Judgment affirmed.*

BANK OF KENTUCKY v. ADAMS EXPRESS COMPANY.

PLANTERS' NATIONAL BANK OF LOUISVILLE v. ADAMS EXPRESS COMPANY.

1. A party engaged as a common carrier cannot, by declaring or stipulating that he shall not be so considered, divest himself of the liability attached to the fixed legal character of that occupation.
2. A common carrier, who undertakes for himself to perform an entire service, has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ an agency, but it must be subordinate to him, and not to the shipper, who neither employs it, pays it, nor has any right to interfere with it. Its acts become his, because done in his service and by his direction.
3. Therefore, where an express company engaged to transport packages, &c., from one point to another, sends its messenger in charge of them on the car set apart for its use by the railroad company employed to perform the service, the latter company becomes the agent of the former.
4. An exception in its bill of lading, "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire," does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company to which the former had confided a part of the duty it had assumed.
5. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between him and the performing company.

ERROR to the Circuit Court of the United States for the District of Kentucky.

These are actions by the plaintiffs in error to recover the value of certain packages containing money, which, on their transportation over the Louisville and Nashville Railroad in charge of a messenger of the defendant in error, were destroyed by fire. There was a verdict and judgment in each case for the defendant. The plaintiffs sued out these writs of error. The facts are set forth in the opinion of the court. So much of the instructions of the court below as are referred to but not incorporated in the opinion are as follows: —

"If the jury believe that the teller of the Louisiana National Bank presented the bill of lading to the agent of the express company for his signature, with the blanks filled, and at such time delivered to the agent the package of money,

without disclosing who was the owner of it, but addressed to the plaintiff at Louisville that the bill of lading was signed and redelivered to the teller, and forwarded to the plaintiff at Louisville, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by the contract, whether it expressly authorized the Louisiana National Bank to make it or not. The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial."

"It is claimed by the plaintiff that the defendant was wanting in care in the use of the safe or box in which the package was at the time of the loss. If there was any such want of reasonable care in this particular, the defendant is undoubtedly liable; but if the safe was such as prudent persons engaged in like employment generally use for the purpose, there was no want of care, and the defendant is not responsible for want of care in this particular."

Mr. John M. Harlan for the plaintiffs in error.

While the right of a common carrier to contract for a reasonable limitation of his responsibility cannot be disputed, it is equally clear that such responsibility cannot be restricted or qualified, unless he "expressly stipulates for the restriction and qualification." *York Company* v. *Central R. R.*, 3 Wall. 107. The exemption should be specific and certain, leaving no room for controversy. *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 383; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 329.

A common carrier does not cease to be such because he has limited his liability by a special contract. *Davidson* v. *Graham*, 2 Ohio St. 140; *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Hooper* v. *Wells, Fargo, & Co.*, 27 Cal. 11; *Christenson* v. *Am. Ex. Co.*, 15 Minn. 270. Nor will he be permitted to stipulate for immunity for his own negligence, or that of his servants or agents, even though he can exercise no control over their actions. *Ashmore* v. *Penn. S. T. Co.*, 4 Dutch. 180; *Railroad Company* v. *Lockwood*, *supra*; *Christenson* v.

Am. Ex. Co., supra; Welch v. *Boston & Albany R. R. Co.*, 15 Am. Law Reg., March, 1876, No. 3, p. 140.

The Louisville and Nashville Railroad Company was, in contemplation of law, for the purposes of transportation, the agent of the defendant in error. The latter is, therefore, responsible for the negligence of the former. *Hooper* v. *Wells, Fargo, & Co., supra; Christenson* v. *Am. Ex. Co., supra; Buckland* v. *Adams Ex. Co.*, 97 Mass. 124; Redfield on Carriers, sect. 56, note 27.

Mr. G. C. Wharton for the defendant in error.

The right of a common carrier to limit by special contract his common-law liability is fully settled. *Express Company* v. *Caldwell*, 21 Wall. 267; *York Company* v. *Central Railroad*, 3 id. 107; *Railroad Company* v. *Lockwood*, 17 id. 357; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344.

The bill of lading was evidence of the contract between the parties. The plaintiffs in error accepted it without objection. They are therefore bound by the conditions therein expressed. *Brooman* v. *Am. Ex. Co.*, 21 Wis. 152; *Grace* v. *Adams Ex. Co.* 100 Mass. 505; *York Company* v. *Central Railroad, supra; Railroad Company* v. *Androscoggin Mills*, 22 Wall. 595; *Meyer, Agent,* v. *Harden's Ex. Co.*, 24 How. Pr. 290; *Railroad Company* v. *F. & M. Bank*, 20 Wis. 123; *Parsons* v. *Monteath and Hazard*, 13 Barb. 353; *Dorr* v. *Steam Navigation Company*, 1 Kern. 485; *Wells* v. *New York Central Railroad Company*, 24 N. Y. 180.

Although the defendant in error remains a common carrier, its liability was limited to that of an ordinary bailee for hire, in reference to the particular limitations in the contract. It is not, therefore, responsible for negligence, or the want of ordinary care of persons over whom it had no control. *Railroad Company* v. *Lockwood, supra; York Company* v. *Central Railroad, supra; New Jersey Steam Navigation Company* v. *Merchants' Bank, supra; Dorr* v. *Steam Navigation Company, supra; Meyer, Agent,* v. *Harden's Ex. Co., supra.*

If the railroad or any of its employés were negligent, the plaintiffs in error have their remedy against it. *New Jersey Steam Navigation Company* v. *Merchants' Bank, supra.*

Neither the relation of master and servant nor that of prin-

cipal and agent existed between the express messenger and the railroad company. *Union Pacific Railroad* v. *Nickols*, 8 Kans. 505; *Yeomans* v. *The Centra Casta Steam Navigation Company*, 44 Cal. 71.

The railroad company not being the servant of the defendant in error, nor under its control, the doctrine of *respondeat superior* does not apply. *Blake* v. *Ferris*, 5 N. Y. 48.

MR. JUSTICE STRONG delivered the opinion of the court.

The defendants in each of these cases are an express company, engaged in the business of carrying for hire money, goods, and parcels, from one locality to another. In the transaction of their business they employ the railroads, steamboats, and other public conveyances of the country. These conveyances are not owned by them, nor are they subject to their control, any more than they are to the control of other transporters or passengers. The packages intrusted to their care are at all times, while on these public conveyances, in the charge of one of their own messengers or agents. In conducting their business, they are associated with another express company, called the Southern; and the two companies are engaged in carrying by rail through Louisiana and Mississippi, to Humboldt, Tenn., and thence over the Louisville and Nashville Railroad to Louisville, Ky., under a contract by which they divide the compensation for carriage in proportion to the distance the package is transported by them respectively. Between Humboldt and Louisville both companies employ the same messenger, who is exclusively subject to the orders of the Southern Express Company when south of the northern boundary of Tennessee, and to the orders of the defendants when north of that boundary.

Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers.

On the twenty-sixth day of July, 1869, the Southern Express Company received from the Louisiana National Bank at New Orleans two packages, one containing $13,528.15, for delivery to the Bank of Kentucky, Louisville, and the other containing

$3,000, for delivery to the Planters' National Bank of Louisville, at Louisville. The money belonged to the banks respectively to which the packages were sent. When the packages were thus received, the agent of the Southern Express Company gave a receipt, or domestic bill of lading, for each, of which the following is a copy (the two differing only in the description of the consignees and in the amount of money mentioned): —

Domestic Bill of Lading.

SOUTHERN EXPRESS COMPANY, EXPRESS FORWARDERS.

"No. 2. $13,528.15. July 26, 1869.

"Received from Lou. Nat. Bank one package, sealed, and said to contain thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dollars.

"Addressed Bank of Kentucky, Louisville, Ky. Freight coll.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, danger, or detention of such package or its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other companies or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss, unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company, SHACKLEFORD."

Across the left-hand end of said receipt was the following printed matter: —

"Insured by Southern Express Company for to only except against loss occasioned by the public enemy.

"For the company —

"Insurance, $ — "

The bills of lading were sent to the consignees at Louisville.

Having thus received the packages, the Southern Express Company transported them by railroad as far as Humboldt, Tenn., and there delivered them to the messenger of the defendants (who was also their messenger) to complete the transportation to Louisville, and to make delivery thereof to the plaintiffs. For that purpose the messenger took charge of them, placing them in an iron safe, and depositing the safe in an apartment of a car set apart for the use of express companies, for transportation to Louisville. Subsequently, while the train to which the car containing the packages was attached was passing over a trestle on the line of the Louisville and Nashville Railroad, and while the packages were in charge of the messenger, the trestle gave way during the night, the train with the express car was thrown from the track, and the car with others caught fire from the locomotive and was burned, together with the money in the safe. The messenger was rendered insensible by the fall, and he continued so until after the destruction was complete. There was some evidence that some of the timber of the trestle seemed decayed.

Upon this state of facts the learned judge of the Circuit Court instructed the jury, that, "If they believed the package was destroyed by fire, as above indicated, without any fault or neglect whatever on behalf of the messenger or defendants, the defendants have brought themselves within the terms of the exceptions in the bill of lading, and are not liable." And again, the court charged: "It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad Company, and its agents, or not." And again: "But when he (the common carrier) has limited his liability, so as to make himself responsible for

ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence, or the negligence of his agents, and not the negligence of persons over whom he has no control. If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care, — that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, — and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same, unless it arises from his want of care, or the want of care of his employés." At the same time, the learned judge instructed the jury as follows: "Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you, that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

These extracts from the charge, to all of which exception was duly taken, exhibit the most important question in these cases, which is, whether the stipulations of the carriers' receipt or bill of lading relieved them from responsibility for the negligence of the railroad company employed by them to complete the carriage. The Circuit Court was of opinion, as we have seen, that they did; and practically instructed the jury, that, under the modified contract of bailment, the defendants were liable for loss by fire only to the extent to which mere bailees for hire, not common carriers, are liable; that is, that they were responsible only for the want of ordinary care exercised by themselves or those who were under their control. With this we cannot concur, though we are not unmindful of the ability with which the learned judge has defended his opinion.

We have already remarked, the defendants were common carriers. They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation,

its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers.

The duty of a common carrier is to transport and deliver safely. He is made, by law, an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God. By special contract with his employers, he may, it is true, to some extent, be excused, if the limitations to his responsibility stipulated for are, in the judgment of the law, reasonable, and not inconsistent with sound public policy. It is agreed, however, that he cannot, by any contract with his customers, relieve himself from responsibility for his own negligence or that of his servants; and this because such a contract is unreasonable and contrary to legal policy. So much has been finally determined in *Railroad Company* v. *Lockwood*, 17 Wall. 357. But can he, by a contract made with those who intrust property to him for carriage and delivery, — a contract made at the time he receives the property, — secure to himself exemption from responsibility for consequences of the negligence of a railroad company or its agents not owned or controlled by him, but which he employs in the transportation? This question is not answered in the Lockwood case. It is raised here, or rather the question is presented, whether a common carrier does relieve himself from the consequences of such negligence by a stipulation that he shall not be liable for losses by fire.

The exception or restriction to the common-law liability introduced into the bills of lading given by the defendants, so far as it is necessary to consider it, is, "that the express company are not to be liable in any manner or to any extent for any loss or damage, or detention of such package or its contents, or of any portion thereof, occasioned by fire." The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. It is not to be presumed the parties intended to make a contract which the law does not allow. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring accidentally, or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful

acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct, or that of their servants or agents. But the Circuit Court ruled, the exception did extend to negligence beyond the carriers' own, and that of the servants and agents appointed by them and under their control, — that it extended to losses by fire resulting from the carelessness of a railroad company, employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was, that the railroad company and its employés were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody: either of the express company, or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employés. It is true, the defendants had also no control over the company or its servants: but they were its employers, presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency; but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it.

If, then, the Louisville and Nashville Railroad Company was acting for these defendants, and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Company* v. *Lockwood?* The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically, he has; but most frequently, when the negligence of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible, because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor and to the public, that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be.

For these reasons, we think it is not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed.

There are other reasons of weight which deserve consideration.

Express companies frequently carry over long routes, at great distances from the places of destination of the property carried, and from the residence of its owners. If in the course of transportation a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of the public conveyances are responsible, and they can obtain redress much more conveniently than distant owners of the property can. Indeed, in many cases, suits by absent owners would be attended with serious difficulties. Besides, express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, enclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The department in the car was the defendants' for the time being; and, if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. *Miles* v. *Cattle*, 6 Bing. 743; *Towers* v. *The Utica & Syracuse R. R. Co.*, 7 Hill (N. Y.), 47; Redf. on Railw., sect. 74.

Now, can it be a reasonable construction to give to the contract between the defendants and the plaintiffs, that the former, who had agreed to carry and deliver the packages at Louisville, reserved to themselves the right to employ a subordinate carrier, arrange with him that he should be responsible only for ordinary vigilance against fire, and by that arrangement relieve themselves from what without it would have been their clear duty? Granting that the plaintiffs can sue the railroad company for the loss of the packages through its fault, their right comes through their contract between it and the defendants. They must claim through that. 6 How. 381. Had the packages

been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs. But, as they were not so delivered, the right of the plaintiffs to the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading. We cannot close our eyes to the well-known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner, some of the responsibilities of common carriage are often sought to be evaded; but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company.

It has been urged on the part of the defence, that, though the contract does not attempt to exempt, and could not have exempted, the express company from liability for loss occasioned by the neglect of itself or its servants, yet, when it is sought to charge the company with neglect, it must be such as it is responsible for upon the general principles of law; and that, upon those principles, no one is responsible for damage occasioned by neglect, unless it be the neglect of himself, his servants, or agents. The argument mistakes, we think, when it asserts, that, upon general principles of law, no one is responsible for the consequences of any neglect except his own, or that of his agents or servants. Common carriers certainly are, and for very substantial reasons. These defendants, it is agreed, were common carriers; and they remained such after the exception in their receipt. If it be said, the exception reduced their responsibility to such an extent as to make them liable only for such neglect as fastens a liability upon persons who are not common carriers, the answer is, such an averment assumes the

very thing to be proved; and, even if the argument were sound, the question would still remain, whether the railroad company employed by the defendants to effect the carriage is not properly to be regarded as their agent, though not under their control. That question we have already considered.

Again: it is urged, that, though the defendants remained common carriers, notwithstanding their contract, their responsibility was limited by their receipt to that of an ordinary bailee for hire; and, as such a bailee is not held liable for the neglect of persons over whom he has no control, it is argued that these defendants are not liable for the negligence of the railroad company. This also assumes what cannot be admitted. Although we are told all the authorities agree, that, when a common carrier has by special contract limited his liability, he becomes, with reference to that particular transaction, an ordinary bailee, — a private carrier for hire, — or reduces his responsibilities to those of an ordinary bailee for hire, yet we do not find that the authorities assert that doctrine, if by the phrase "that particular transaction" is meant the undertaking to carry. Certainly, those to which we have been referred do not. We do not deny that a contract may be made which will put a common carrier on the same level with a private carrier for hire, as respects his liability for loss caused by the acts or omissions of others. The consignor may, by contract, restrain him; may direct how and by what agencies he shall carry. Under such an arrangement he may become a mere forwarder, and cease to be a carrier. But what we have to decide in these cases is, whether the contract proved has that operation. We have already said, we think it has not. The exception in the bills of lading has sufficient to operate upon, without being a cover for negligence on the part of any persons engaged in the service undertaken by the carriers. It exempts the defendants from responsibility for loss by fire, caused by the acts or omissions of all persons who are not agents or agencies for the transportation.

That is a large restriction; and beyond that, in our judgment, the exception in the present case does not extend.

To the opinion we have thus expressed we find direct support in the case of *Hooper* v. *Wells, Fargo, & Co.*, 27 Cal. 11.

There an express company had undertaken to transport gold-dust and bullion from Los Angeles to San Francisco, and deliver to address. The receipt for the property contained the following stipulation: "In no event to be liable beyond our route, as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo, & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, &c., unless specially insured by them, and so specified in this receipt." In the course of the transportation, the messenger of the carriers who had the property in charge took it on board a steam-tug, for the purpose of placing it on a steamer bound to San Francisco. On the way to the steamer, the boiler of the steam-tug exploded, in consequence of carelessness of its officers, and the gold-dust and bullion were thereby lost. The steam-tug did not belong to the express company, nor was it or its officers under their control. Yet the court adjudged that the managers and employés of the steam-tug were in legal contemplation the managers and employés of the carrier, and that the restrictive clause in the receipt did not exempt the carriers from liability for loss occasioned by the carelessness of those employés. To the same effect is the case of *Christensen et al.* v. *The American Ex. Co.*, 15 Minn. 270, and the case of *Machu* v. *The London & South-western Railway Company*, 2 Exch. 415, though arising under the carrier acts of 11 Geo. IV. and 1 Wm. IV., is very analogous. The statute declared that the carrier should be liable to answer for the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ. The court considered that all parties actually employed in doing the work which the carrier undertook to do, either by himself or his servants, were to be regarded as his servants, within the meaning of the act. Baron Rolfe said, the right as against the carriers arises not from the relation of master and servant, but by virtue of the contract into which they have entered to deliver the goods. This was said in answer to an argument like the one relied upon in this case, that the relation of master and servant could not exist between the carriers and the servants of a sub-contractor.

The other objections urged against the charge given by the court below to the jury require but brief notice.

We find no error in what the circuit judge said upon the question whether the bills of lading, with the exceptions, constituted the contract between the parties. The charge in this particular is justified by very numerous authoritative decisions. *York Company* v. *Central Railroad Company*, 3 Wall. 107; *Grace* v. *Adams*, 100 Mass. 505; *Wells* v. *The Steam Nav. Co.*, 2 Comst. 204; *Dorr* v. *New Jersey Steam Nav. Co.*, 1 Kern. 485; 6 How. 344; 3 Wall. 107; 6 Blatchf. 64; *Kirkland* v. *Dinsmore*, 62 N. Y. 161.

Nor was there error in the instruction given respecting the iron safe. Taken as a whole, it was correct.

The charge covered the whole case, and, except in those particulars in which we have indicated our opinion that it was erroneous, we find no just reason to complain of it.

But for the errors we have pointed out new trials must be awarded.

Judgment in each case reversed, and the record remitted with directions to award a venire de novo.

UNITED STATES *v.* FORTY-THREE GALLONS OF WHISKEY, ETC.

1. Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the unlicensed introduction and sale of spirituous liquors in the "Indian country," but extend such prohibition to territory in proximity to that occupied by Indians.
2. It is competent for the United States, in the exercise of the treaty-making power, to stipulate, in a treaty with an Indian tribe, that, within the territory thereby ceded, the laws of the United States, then or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect, until otherwise directed by Congress or the President of the United States.
3. Such a stipulation operates *proprio vigore*, and is binding upon the courts, although the ceded territory is situate within an organized county of a State.

ERROR to the Circuit Court of the United States for the District of Minnesota.

This is a libel of information by the United States against

forty-three gallons of whiskey, sundry peltries, and other goods and merchandise, seized as forfeited by virtue of the twentieth section of the act of Congress approved June 30, 1834, as amended by the act approved March 15, 1864.

There are two special counts in the libel. The first, in substance, sets forth, that on Feb. 12, 1872, Bernard Lariviere, a white person, of the village of Crookston, in the county of Polk, and State of Minnesota, did unlawfully carry and introduce into said village, which is located upon the territory ceded to the United States by treaty with the Red Lake and Pembina bands of Chippewa Indians, made and concluded Oct. 3, 1863, and proclaimed May 5, 1864, the spirituous liquors particularly described, contrary to the treaty and the act of Congress above cited; that an Indian agent, duly appointed, having reason to suspect, and being informed, that spirituous liquors had been introduced by said Lariviere into said county of Polk in violation of the act of Congress, searched and caused to be searched the goods, merchandise, peltries, &c., which he had in his possession at Crookston, in the ceded territory aforesaid: upon which search the whiskey was found stored, packed, and mingled with and in the packages, goods, and peltries, and in the places of deposit of said Laraviere, and was so carried and introduced into the ceded territory, contrary to the form of statute of the United States in such case made and provided, and was seized and taken by the Indian agent as forfeited, together with all the goods and peltries, &c., so found.

The second count sets forth that the whiskey was introduced with the intent to sell, dispose of, and distribute the same to and among the bands and tribes of Chippewa Indians who frequented the village of Crookston, and lived under the charge of an Indian agent upon a reservation near that place.

The information prays that the said goods, merchandise, peltries, &c., may be decreed and declared forfeited, and the forfeiture properly enforced.

Lariviere, a claimant, who first appeared in response to the monition, demurred and excepted to the libel, upon the ground that it appeared, from its recitals, that the court had no jurisdiction; that the property never was introduced, nor was it

intended to be introduced, into any Indian country; but that it was affirmatively shown by the libel that it was searched and seized at Crookston, in the county of Polk, and State of Minnesota, the same being an organized county, and said Crookston not being in or adjoined to or near any Indian country: hence, that the seizure was without any authority of law, &c. Grant, another claimant, also excepted and demurred, because it appeared in the libel that the goods were seized within the jurisdiction of the State of Minnesota, and not on any lands within any Indian country, or in any country exclusively within the jurisdiction of the United States.

The court below sustained the demurrer and exceptions, and dismissed the libel.

The United States thereupon sued out this writ of error.

The act of March 15, 1864 (13 Stat. 29), is as follows: —

"*Be it enacted, &c.*, That the twentieth section of the 'Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,' approved June 30, 1834, be, and the same is hereby, amended, so as to read as follows, to wit: —

"'SECT. 20. *And be it further enacted*, That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district or circuit court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than $300: *Provided, however*, That it shall be a sufficient defence to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department, or any officer duly authorized thereunto by the War Department. And if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superintendent, agent, sub-agent, or commanding officer, to cause the boats, stores, packages, wagons, sleds, and other places of deposit

of such person, to be searched; and, if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bonds put in suit. And it shall, moreover, be the duty for any person in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. And in all cases arising under this act, Indians shall be competent witnesses.'"

Art. 7 of the treaty between the United States, concluded Oct. 3, 1863, and the Red Lake and Pembina band of Chippewa Indians, proclaimed May 5, 1864 (13 Stat. 668), is as follows: —

"The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States."

Submitted on printed arguments by *Mr. Assistant Attorney-General Smith* for the plaintiff in error.

Trade with Indian tribes is, in all its forms, subject exclusively to the regulations of Congress. Duer's Const. Jur. 281; Rawle on the Const., c. 9, 84; 2 Story on Const., sects. 1097–1101.

The mere erection of the Territory of Minnesota into a State did not *ipso facto* cause it to cease to be "Indian country." *United States* v. *Bailey*, 1 McLean, 235; *United States* v. *Cisna*, id. 254; *United States* v. *Ward*, 1 Woolw. C. C. 19, 21.

The act of 1834, as amended by that of 1864, is a "regulation of commerce," and therefore within the constitutional powers of Congress. *United States* v. *Holliday*, 3 Wall. 417.

Congress, having the power to define the "Indian country," and prohibit the unlicensed introduction and sale of liquors within it, can either enlarge or diminish the boundaries of such country, as it deems best for the interests of intercourse or commerce.

Where the United States recognizes and declares the tribal condition of Indian bands, the courts will follow. *Cherokees* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 id. 515.

The United States has, by treaty with the Indians, extended its laws to the territory in which this liquor was seized.

A treaty, as the law of the land, is superior to any State legislation, and is valid even as a municipal regulation, until superseded by some act of Congress. *Ware* v. *Hylton*, 3 Dall. 236; *Taylor* v. *Morton*, 2 Curtis, C. C. 454; 1 Story on Const., sect. 1838; *Worcester* v. *Georgia*, *supra*.

Mr. M. Lamprey, *contra*.

By the treaties of 1855 (10 Stat. 1165) and 1863 (13 Stat. 667), the territory upon which the goods in question were seized was transferred to the United States, and ceased to be Indian country. Within its limits the trade and intercourse laws became inoperative, for want of a subject-matter on which they could act.

The extension of those laws to an organized county in Minnesota, by force of a treaty to which the assent of that State was not obtained, is an unauthorized infringement of her jurisdiction. By the act of May 11, 1858, she was admitted into the Union, upon an equal footing with the original States. Treaties made before that date, so far as they provide that the act of 1834 shall extend to territory ceded while Minnesota was a Territory, became ineffectual after her admission into the Union. Subsequent treaties, so far as they exclude her jurisdiction over the ceded territory, interfere with her internal commerce and abridge the rights of her citizens, are an invasion of her sovereignty. A treaty which provides regulations which the Federal government cannot constitutionally impose, is to that extent without validity or binding force.

MR. JUSTICE DAVIS delivered the opinion of the court.

It may be that the policy of the government on the subject of Indian affairs has, in some particulars, justly provoked criticism: but it cannot be said, that there has not been proper effort, by legislation and treaty, to secure Indian communities against the debasing influence of spirituous liquors. The evils from this source were felt at an early day; and, in order to promote the

welfare of the Indians, as well as our political interests, laws were passed and treaties framed, restricting the introduction of liquor among them. That these laws and treaties have not always secured the desired result, is owing more to the force of circumstances which the government could not control, than to any unwillingness to execute them.

Traffic with Indians is so profitable, that white men are constantly encroaching on Indian territory to engage in it. The difficulty of preventing this intrusion, and of procuring convictions for offences committed on the confines of civilization, are the obstacles in the way of carrying into effect the intercourse laws. It is doubtless true, that they are as well executed as could be expected under the circumstances. In this case, the United States, in its endeavors to enforce them, is met with the objection, that they do not apply to the country in which the liquor was seized.

The Red Lake and Pembina band of Chippewa Indians ceded to the United States, by treaty, concluded Oct. 2, 1863, a portion of the lands occupied by them, reserving enough for their own use. The seventh article is in these words: "The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States." The ceded country is now part of an organized county of the State of Minnesota; and the question is, whether the incorporation of this article in the treaty was a rightful exercise of power. If it was, then the proceedings to seize and libel the property introduced for sale in contravention of the treaty were proper, and must be sustained.

Few of the recorded decisions of this court are of greater interest and importance than those pronounced in *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1; and *Worcester* v. *The State of Georgia*, 6 Pet. 515. Chief Justice Marshall, in these cases, with a force of reasoning and an extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the States within whose boundaries they lived; and his exposition was based on

the power to make treaties and regulate commerce with the Indian tribes. Under the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, — a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them "separate, subordinate, and dependent." Accordingly, treaties have been made and laws passed separating Indian territory from that of the States, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States. Congress very early passed laws relating to the subject of Indian commerce, which were from time to time modified by the lessons of experience.

The act of June 30, 1834 (4 Stat. 732), as amended by the act of March 15, 1864 (13 Stat. 29), is the one now in force on this subject. It defines what shall be deemed Indian country, directs the manner in which trade and intercourse with the Indians shall be carried on, and forbids any one, under certain penalties, to give or sell liquor to an Indian in charge of an agent, or to introduce it into the Indian country.

In *United States* v. *Holliday*, 3 Wall. 409, the power of Congress to pass the act of 1864 was the main point in controversy. Holliday was indicted for selling liquor in Gratiot County, Mich., to an Indian in charge of an agent. The county was not Indian country, nor did it even have an Indian reservation in it. It was contended, among other things, that the sale of liquor to an Indian, or any other person within the county, was a matter of State regulation, with which Congress had nothing to do. But this court held that the power to regulate commerce with the Indian tribes was, in its nature, general, and not

confined to any locality; that its existence necessarily implied the right to exercise it, whenever there was a subject to act upon, although within the limits of a State, and that it extended to the regulation of commerce with the individual members of such tribes. It was also contended that the intercourse act was not a regulation of commerce within the meaning of the Constitution; but the court held otherwise, and said, "It (the act) relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one."

The power is in no wise affected by the magnitude of the traffic or the extent of the intercourse. As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why cannot Congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground. If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions, should country adjacent to their reservations be used to carry on the liquor traffic with them.

The Indian country, as defined by the act of 1834, was at that date so remote from settlements, that there was no occasion to extend the prohibition beyond its limits. It has since then been so narrowed by successive treaties, that the white popu-

lation is now all around it, and regarding it with a wistful eye. In view of this changed condition, it would be strange, indeed, if the commercial power, lodged solely with Congress and unrestricted as it is by State lines, did not extend to the exclusion of spirituous liquors intended to corrupt the Indians, not only from existing Indian country, but from that which has ceased to be so, by reason of its cession to the United States. The power to define originally the "Indian country," within which the unlicensed introduction and sale of liquors were prohibited, necessarily includes that of enlarging the prohibited boundaries, whenever, in the opinion of Congress, the interests of Indian intercourse and trade will be best subserved.

It is true, Congress has not done this: but the Constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster and Elam* v. *Neilson*, 2 Pet. 314, has said, "That a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." No legislation is required to put the seventh article in force; and it must become a rule of action, if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt. From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations, dependent, it is true, but still capable of making treaties. This was only following the practice of Great Britain before the Revolution. In *Worcester* v. *The State of Georgia*, *supra*, the court say, "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In consequence of this interpretation, a country which, if left to the Indians, would have remained a wilderness, is now occupied by farms, towns, and cities. The only legitimate way to accomplish this beneficent result was by extinguishing the Indian title; and the subject-matter of this treaty is the cession of a large tract of land in the State of Minnesota and the Territory of Dakota. Indeed, the acquisition of territory

has been the moving cause of all Indian treaties, and will continue to be so, until Indian reservations are confined to very narrow limits. It is admitted that these had the same right as other tribes to occupy their lands as long as they pleased, and that this right could only be extinguished by voluntary cession to the government. If so, why not annex to the cession a condition deemed valuable to them, and beneficial to the United States, as tending to keep the peace on the frontiers?

The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew, that, if there was no cession, they were already sufficiently protected by the extent of their reservation.

Under such circumstances, it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines. Based as it is exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of State equality.

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of

either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can be thus obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

Minnesota, instead of being injured, is benefited. An immense tract of valuable country formerly withheld from her civil jurisdiction is subjected to it, and her wealth and power greatly increased. Traversed by railroads that were built, in part, at least, with lands which this treaty enabled Congress to grant, the country is open to sale and pre-emption and homestead settlement, and will soon be occupied by a hardy and industrious people. The general government asks in return for this, that the ceded territory shall retain its original *status*, so far as the introduction within it of spirituous liquors and the sale of them to the Pembina Indians are concerned.

It would seem, apart from the question of power, that the price paid by the State bears no proportion to the substantial and enduring benefits conferred upon her; and we are happy to say, that her officers are not engaged in making this defence.

Judgment reversed, and record remanded with directions to overrule the demurrer and try the case.

OBER v. GALLAGHER.

1. In a suit brought by a citizen of Louisiana, in the Circuit Court of the United States for the Eastern District of Arkansas, to enforce a lien on lands situate within that district, one of the defendants, a citizen of Tennessee, was served with process in Arkansas. *Held*, that, under the act of Feb. 28, 1839 (5 Stat. 321), such service brought him within the jurisdiction of the court.
2. A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced.
3. The holder of a note which is secured by mortgage may proceed at law and in equity at the same time, until he obtains actual satisfaction of the debt.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

Thompson purchased from Fleming, Jan. 15, 1867, a plantation situated partly in Prairie County and partly in Pulaski County, Ark., at the price of $60,000, to be paid in ten equal instalments, the first March 1, 1867, and the remainder annually thereafter. Notes, negotiable in form, and expressing on their face that their consideration was the purchase of this plantation, were executed by Thompson to Fleming for the several instalments, payable at the times agreed upon. On the same day, the date of the purchase, Fleming and his wife conveyed the property to Thompson by a deed in which, after a recital of the notes for the purchase-money, was the following: "But it is expressly agreed by the parties of the first and second part, that the said parties of the first part shall, and do hereby, retain a lien upon all of said lands for the payment of said ten promissory notes given for the purchase-money, and, when the same are fully paid off, said lien is to stand released and discharged." This deed was recorded in Pulaski County, Feb. 26, 1867. It was also duly recorded in Prairie County.

At the time of the purchase, Thompson was a citizen of Louisiana, and Fleming, of Arkansas. The note falling due March 1, 1867, was paid Jan. 19, 1867; and on March 20, 1867, Fleming transferred all the other notes, by indorsement, to Gallagher, a citizen of Louisiana. Gallagher afterwards sued Thompson in the fifth district court for the parish of Orleans, La., upon the note falling due March 1, 1869, and, June 7,

1869, recovered judgment thereon for $6,000 and interest from March 4, with costs. This judgment he has been unable to collect by execution or otherwise.

At the time of the purchase there was also a judgment in the Prairie County Circuit Court of Arkansas, against Fleming, in favor of one Embry, for $643.43 debt, and $63 damages, which was a lien upon the part of the plantation in Prairie County. An execution was issued upon this judgment April 29, 1867, levied May 14, 1867, on the lands covered by the judgment lien; and they were offered for sale by the sheriff, and struck off, Aug. 19, 1867, to one English, for $844.70. In pursuance of this sale, the sheriff conveyed them to English, Aug. 24, 1867; and, Feb. 29, 1868, English conveyed them to Ober, the appellant, to whom at the same time Thompson also conveyed them.

Gallagher afterwards, being a citizen of Louisiana, filed this bill against Ober, a citizen of Arkansas, and Thompson, then a citizen of Tennessee, in the Circuit Court of the United States for the Eastern District of Arkansas, setting forth the sale from Fleming to Thompson; the execution of the notes by Thompson to Fleming; the reservation of the lien in the deed from Fleming; the indorsement of the note falling due March 1, 1869, by Fleming to Gallagher; the judgment against Thompson thereon in the fifth district court for the parish of Orleans; the judgment of Embry against Fleming; its lien; the sale and conveyance by the sheriff to English; and the conveyance by English to Ober, — substantially as above stated. The bill then alleges, in effect, that the purchase by English at the sheriff's sale was for the use of Thompson; that Thompson paid him the money he advanced to the sheriff; that the conveyance to Ober was for the benefit and at the request of Thompson; and that Ober at the time had full knowledge of all the facts. The prayer is, that the property conveyed by Fleming to Thompson may be subjected, under the lien reserved in the deed, to the payment of the amount due upon the judgment in favor of Gallagher.

At the time of the commencement of this suit, Fleming, as well as Thompson, was a citizen of Tennessee. He was not made a party. Ober and Thompson were both served with process in Arkansas, Thompson having been found there at the

time; and they both demurred to the bill, assigning special cause, as follows: —

"1st, Said bill shows that said Thompson is a non-resident of said district, and not within the jurisdiction of this court.

"2d, Said complainant, as the assignee of the note named in said bill, did not take any lien, nor has he any under and by virtue of the assignment of said note.

"3d, Said bill fails to show that John T. Fleming, the original holder and payee of said note, could have brought suit thereon in this court.

"4th, Said bill fails to show that complainant has exhausted his remedies at law to collect the debt named in said bill.

"5th, The judgment exhibited with said bill rendered in the State of Louisiana merged the note named in the bill, and this court has no jurisdiction to enforce such judgment as a lien against the lands described in the bill, or to enforce it at all, until a judgment is rendered on the same in this court at law.

"6th, Said complainant having elected to sue said Thompson at law, he must abide such election, or show that he has used all remedy under such suit, but to no purpose, which said bill does not show."

This demurrer was overruled. Thompson elected to stand by his demurrer, but Ober answered, insisting that the title of English was superior to that of Fleming, and that he was a *bona fide* purchaser from English, without notice. In this way, he claimed to hold the property in Pulaski County free from the lien reserved by Fleming. As to that in Prairie County, he insisted that the note due March 1, 1867, exceeded in amount the value of this part of the property, and that in equity it should be released from the lien.

After this answer, Gallagher, by consent, amended his bill, by setting up his ownership of the other notes indorsed to him, and asking that "as to any of said notes that may be due at the time of rendering the final decree herein," he might have "the same relief that he hath already in and by his original bill prayed; and that, as to the remainder of said notes, the court may give him such relief as may tend to secure the payment of the same when they respectively fall due, without further litigation or delay." At the time of filing this amend-

ment, it was agreed that the answer of Ober to the original bill should be taken as his answer to the amended bill; that Thompson should have the same benefit from his demurrer to the original bill that he would have if he had demurred to the bill as amended: and the cause was set down for hearing upon bill, amended bill, answer, and replication, with leave to both parties to take depositions.

The Circuit Court rendered a decree, April 24, 1874, finding due to Gallagher, upon his judgment, and upon the notes then past due and unpaid, $49,903; establishing a lien in his favor upon the whole plantation in the hands of Ober, as security for the amount so found to be due; and ordering a sale, and an application of the proceeds to its payment. Further directions were also given in respect to the notes not then due.

From this decree Ober alone appeals.

Mr. A. H. Garland for the appellant.

1. The complainant and Thompson were non-residents of the State, and the latter was not within the jurisdiction of the court. When there is a plurality of plaintiffs or defendants, *each one* must possess the requisite character to sue and be sued. The bill must expressly aver this citizenship. Conkling's Treatise, 143 (4th ed.) 343–349; Story's Eq. Pl., sects. 492, 721.

The act of Feb. 28, 1839, does not modify that rule further than to permit the suit to progress against the defendant residing in the State, and to be dismissed against the other. 1 Wheat. 91; 1 Paine, C. C. 410; 3 Cranch, 267.

2. The complainant did not take a special lien, nor has he any under and by virtue of the assignment of said note. 1 Lead. Cas. in Eq. (Hare & Wall.) 367 (3d Am. ed.); *Campbell's Appeal*, 6 Am. Law Reg. 751–765; 2 Wash. Real Prop. 92, sect. 18 (3d ed.); *Shall* v. *Biscoe*, 18 Ark. 142; *In re Brooks*, 2 Bk. Reg. 149; 2 Story, Eq. Jur. 1039, 1040, 1057; Story, Eq. Pl. 118, 134, 153, 158; 4 Rand. (Va.) 447; 1 Eq. Cas. Ab. 93; 6 B. Mon. (Ky.) 393; 7 Cranch, 94; 1 Johns. Ch. 119; 10 Johns. 65; 18 id. 402; 2 Johns. Ch. 418; 1 Paige, 329; 10 Ves. 411; 11 id. 13; 2 Story, sect. 1250; 11 Ohio, 21; 5 Cranch, 322; 2 Spence, Eq. Jur. 850–852; 12 Wheat. 594.

3. The bill fails to show that Fleming, the original holder

and payee of said note, could have brought suit thereon in the court below. *Sheldon* v. *Sill*, 8 How. 441; Conkling's Treatise, 109, 133; 4 Cranch, 46; 16 Pet. 315; 2 How. 241; 13 id. 183; 8 Wall. 393.

4. The bill fails to show that complainant has exhausted his remedies at law to collect the debt named therein. *Livingston* v. *Van Ingen*, 1 Paine, 45; *Loman* v. *Clarke*, 2 McLean, 568; *Toby* v. *County of Bristol*, 3 Story, 800; *Bennett* v. *Butterworth*, 11 How. 669; *Jones* v. *McMasters*, 20 id. 9; 4 Dall. 5; 1 Pet. 232; 3 id. 210; 15 How. 299; 2 Black, 245; 2 Curt. 592; Baldw. C. C. 394; 5 McLean, 337; *Mex* v. *Autbury*, 6 Eng. (11 Ark.) 411; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *Apperson* v. *Ford*, 23 Ark. 746; Story, Eq. Pl., sect. 257 *a*; 1 Clarke (Iowa), 98, 148; *Carter* v. *Bennett*, 6 Fla. 214; *Scott* v. *McFarland*, 34 Miss. (5 George), 363.

5. The judgment rendered in Louisiana merged the note; and the court below had no jurisdiction to enforce such judgment as a lien against the lands, or to enforce it at all, until a judgment should be rendered thereon in Arkansas. *Green* v. *Sarmiento*, Pet. C. C. 74; 3 W. C. C. 17; *Postlewaite* v. *Howe*, 3 Clarke (Iowa), 365; *Besby* v. *Palmer*, 1 Hill (N. J.), 482; *Jones* v. *Jamison*, 15 La. Ann. 35; *Kittredge* v. *Stephens*, 16 Cal. 381; *Temple* v. *Scott*, 3 Minn. 419 *et seq.*; Freeman on Judgments, 215–221; Story, Confl. Laws, 584–603, 609 *a*; Bright. Dig. p. 499, sect. 188; *Carter* v. *Bennett*, *supra*; 1 Rob. Pr. 194–288; 16 Pet. 26; 1 McLean, 167; 6 Pet. 389; 34 Miss. 708; *Bean* v. *Smith et al.*, 2 Mason, C. C. 252; *Shields* v. *Thomas*, 18 How. 253; Conkling's Treatise, 272; 2 Story, 598; 3 Sumn. 425–429; 2 id. 589; 20 How. 591; Bright. Dig. 291.

6. The complainant, having elected to sue Thompson at law, must abide by such election, or show that he has used all remedy under such suit, but to no purpose. 24 Ark. 410; Mitf. Pl. 10, note 1 *et seq.*; Wigram's Discov. 54, note 4; id. 67.

Mr. W. M. Rose, for the appellee.

MR. CHIEF JUSTICE WAITE stated the case, and delivered the opinion of the court.

No errors have been assigned either upon the record or in the briefs of counsel, as required by our Rule 21. For this

reason, we might very properly affirm the decree without looking into the record; but, as the case has been submitted and briefs filed on both sides, we will, without making this a precedent to justify such neglect of this salutary rule in the future, proceed to the consideration of the points suggested by the counsel for the appellant in opposition to the decree.

1. It is insisted, that as Thompson was, at the time of the commencement of the suit, a citizen of Tennessee, and a necessary party, the court could not take jurisdiction of the cause; and in support of this objection, it is said, that, where there is a plurality of plaintiffs or defendants, *each one* must have the requisite character of citizenship to sue and be sued.

The question here presented cannot be one of practical importance in the future, as the act of March 3, 1875 (18 Stat. 470, sect. 1), has extended the jurisdiction of the circuit courts to controversies "between citizens of different States," using for that purpose the very words of the Constitution (art. 3, sect. 2), and thus avoiding the embarrassments that frequently arose under the act of 1789 (1 Stat. 78, sect. 11), which limited their authority to controversies between "a citizen of the State where the suit is brought and a citizen of another State." It is, therefore, sufficient to say, that, since the act of Feb. 28, 1839 (5 Stat. 321, sect. 1), it has never been doubted that the circuit courts had jurisdiction of a suit in equity of a local nature, where a citizen of one State prosecuted citizens of other States, in a district where the property in controversy was situated, and of which one of the defendants was an inhabitant. If all the defendants were served with process in the district, or voluntarily appeared in the suit, the decree when passed would bind all. But if they were not served, or did not appear, and they were not indispensable parties, the case might proceed without them, and their interests would not be affected by what was done in their absence. If, however, an indispensable party was a citizen of the same State with the plaintiff, the jurisdiction would be defeated; because the controversy would not be between citizens of different States, and thus not within the judicial power of the United States as defined by the Constitution. The decisions to this effect are numerous. *Hagan* v. *Walker*, 14 How. 36; *Shields* v. *Barrow*, 17 id. 141; *Clear-*

water v. *Meredith*, 21 id. 492; *Inbusch* v. *Farwell*, 1 Black, 571; *Barnes* v. *Baltimore City*, 6 Wall. 286; *Jones* v. *Andrews*, 10 id. 332; *Commercial & R. R. Bank of Vicksburg* v. *Slocomb*, 14 Pet. 65. In *Louisville Railroad Company* v. *Litson*, 2 How. 497, it is also distinctly stated (p. 556), that the act of 1839 "was passed exclusively with an intent to rid the courts of the decision in the case of *Strawbridge* v. *Curtis*," 3 Cranch, 267, which, with that of *The Bank* v. *Deveaux*, 5 Cranch, 84, had "never been satisfactory to the bar." p. 555.

Here, Gallagher could sue both Thompson and Ober separately in the courts of the United States, and they could each sue him. The suit is of a local nature, its object being to subject lands in Arkansas to the payment of a debt. It must, therefore, be brought in the district where the property is situated. Ober is a citizen of that State, and is the principal defendant. The relief demanded consists in bringing his property to sale, to pay a debt charged upon it. As to him, the court confessedly had jurisdiction. Thompson, though a citizen of Tennessee, was served with process in Arkansas; and this, under the provisions of the act of 1839, brought him into the case, and within the jurisdiction of the court.

2. As Fleming, the payee of the notes secured by the lien, was, when the suit was commenced, a citizen of Tennessee, and, consequently, incompetent to sue Thompson, also a citizen of that State, in the courts of the United States, it is claimed that Gallagher cannot maintain this suit.

This objection is also based upon a clause in sect. 11 of the Judiciary Act of 1789, repealed by the act of March 3, 1875, which provides that no circuit court shall have cognizance of any suit to recover the contents of a promissory note in favor of an assignee, unless a suit might have been prosecuted in such court to recover such contents if no assignment had been made. Under this act, it was held, in *Sheldon* v. *Sill*, 8 How. 441, that an indorsee of a negotiable promissory note, secured to the payee by a mortgage, could not sue in the courts of the United States to foreclose the mortgage, unless the mortgagee could. Gallagher did not sue in this case originally as the indorsee of a note, but as the owner of a judgment of record in his own favor, secured by a lien which he asked to have

enforced. The note was no longer in existence as an outstanding liability. It had been merged in the judgment, and was, as a note, extinguished. Gallagher no longer claims as the assignee of the note, but as the owner of a judgment in his favor against Thompson. He can sue Thompson upon the judgment in the courts of the United States in Tennessee. As was well said by Mr. Justice Story, in *Bean* v. *Smith*, 2 Mass. 269, "It is no objection to the jurisdiction, that at some anterior period the transaction assumed a shape not within the reach of that jurisdiction. It is sufficient, if it has now become so modified by the act of the parties, or by the principles of law, that jurisdiction now rightfully attaches." Thompson is no longer a debtor by note to Fleming, but by judgment to Gallagher. In the collection of the judgment, Gallagher does not sue or proceed upon the note and its assignment, but upon the judgment.

The court had, therefore, jurisdiction of the suit as originally brought; and this jurisdiction was not defeated by the amendment which introduced the notes, not in judgment, but secured by the lien, into the case. Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief. Story's Eq. 64 *k*. If the amendment had not been made, the court would in its decree have taken care to protect the rights of the holders of the outstanding notes; and that is all it is called upon to do by the amendment. Having jurisdiction for one purpose, it may be retained for all within the general scope of the equities to be enforced.

3. Another objection urged is, that the assignment of the notes by Fleming did not transfer the lien he had reserved as security for their payment. It is undoubtedly true, that, in many of the States, the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase-money does not pass by an assignment of the debt; but here the lien was not left to implication: it was expressly reserved. In fact, it is more than a lien. In equity, it is a mortgage, so made by express contract. The acceptance by Thompson of the deed containing the reservation amounts to an express agreement on his part that the land should be

held as security for the payment of what he owed on account of the purchase-money. This created an equitable mortgage; and such a security passes by an assignment of the debt it secures. We so held in *Batesville Institute* v. *Kauffman*, 18 Wall. 154, a case which also came from the Eastern District of Arkansas.

It is claimed, however, that the law of Arkansas is different, and that the Supreme Court of that State has decided that a lien to secure the payment of purchase-money, expressly reserved by the vendor in his deed, does not pass by an assignment of the debt. If such was the settled rule of law in the State when the notes which are under consideration in this case were assigned, we should be compelled to recognize it as a rule of property there, and be governed accordingly. *Suydam* v. *Williamson*, 24 How. 434. But we do not understand such to have been the fact. The first case in which this ruling was made was *Sheppard* v. *Thomas*, 26 Ark. 617, decided at the June Term, 1871, by a divided court, two out of the five judges dissenting. This case was followed also by a divided court in *Jones* v. *Doss*, 27 Ark. 518, decided at the December Term, 1872; but almost immediately thereafter, April 24, 1873, the legislature provided by statute as follows: —

"The lien or equity held or possessed by the vendor of any real estate, for the sale of the same, shall inure to the benefit of any assignee of the notes or obligations given for the purchase-money of such real estate, and such lien or equity shall be assignable, and payable by indorsement or otherwise in the hands of such assignee, and any such assignee may maintain an action or suit to enforce the same: *Provided*, the said lien or equity is expressed upon or appears from the face of the deed of conveyance." Pamphlet Laws, 1873, p. 217, sect. 28.

This legislation was followed, at the December Term, 1873, by the case of *Campbell* v. *Rankin*, 28 Ark. 401, in which it was strongly intimated, that, if it were necessary, the previous cases in which this question was decided would be overruled. Under these circumstances, we are not satisfied that, when these notes were assigned, it was a settled rule of property in Arkansas that a lien for purchase-money expressly reserved would not pass by an assignment of the debt. Such being the case,

the Circuit Court was right in following our decision in *Batesville Institute* v. *Kauffman*, especially as its decision was not made until after the doubts expressed in *Campbell* v. *Rankin*, as to the correctness of the rulings in the previous cases.

4. It is finally insisted that Gallagher must exhaust his remedies at law before he can come into a court of equity to subject the land. This is not a creditor's bill to reach equitable assets. There is no attempt to enforce the judgment as a judgment, but to reach securities held for the debt. The suit is in reality one to enforce a mortgage given to secure a note, but not commenced until after the note had gone into judgment at law. The note was merged in the judgment: but the lien which secured it was not; that was simply transferred from the note to the judgment.

An election to sue at law upon a note secured by mortgage does not make it necessary for the holder to exhaust his remedies in that forum before he can go into equity to enforce his mortgage. He may proceed at law and in equity at the same time, and until actual satisfaction of the debt has been obtained.

This disposes of all the questions presented in the demurrer, and brings us to a consideration of the case upon its facts. Without going into the details of the evidence, it is sufficient to say, that we are entirely satisfied that English purchased the property in Pulaski County at the sheriff's sale, for the benefit of Thompson; that Thompson either furnished him the money to pay the sheriff, or repaid him what he may have advanced within a short time thereafter; that the sale to Ober was made by Thompson to pay or secure a debt he owed; that English conveyed to Ober at the request of Thompson, and to give effect to the arrangement he had made; that Ober, at the time of his purchase, had full knowledge of all the facts, and that he took the title to the property incumbered by the lien reserved in the deed from Fleming.

It follows that the decree of the Circuit Court was right, and it is, therefore, *Affirmed.*

SHERMAN v. BUICK.

1. Testimony, whether parol or documentary, which shows a want of power in officers who issue a patent, is admissible in an action at law to defeat a title set up under it. In such case, the patent is not merely voidable, but absolutely void; and the party is not obliged to resort to a court of equity to have it so declared.
2. In construing the act of March 3, 1853 (10 Stat. 246), the court held: 1. School sections sixteen and thirty-six, granted to the State of California by sect. 6 of the act, are also excepted from the operation of the pre-emption law to which, by the same section, the public lands generally are subjected. 2. The rule governing the right of pre-emption on school sections is provided by the seventh section of the act; and it protects a settlement, if the surveys, when made, ascertain its location to be on a school section. 3. In such case, the only right conferred on the State is to select other land in lieu of that so occupied. 4. The proviso to the sixth section, forbidding pre-emption on unsurveyed lands after one year from the passage of the act, is limited to the lands not excepted out of that section, and has no application to the school sections so excepted.

ERROR to the Supreme Court of the State of California.

The plaintiff in error brought suit in the proper court of the State of California to recover possession of a part of section 36, township 5 south, range 1 east, Mount Diablo meridian, and asserted title thereto under a patent from the United States, bearing date May 15, 1869. The defendant claimed under a patent from the State of California, of the date of Jan. 1, 1869. The title of the State is supposed to rest on the act of Congress of March 3, 1853 (10 Stat. 246), granting to her, for school purposes, with certain limitations, every sixteenth and thirty-sixth section within her boundaries, according to the surveys to be thereafter made of the public lands.

The plaintiff, in aid of his patent, and to defeat the title of the State under the act of 1853, offered to prove, that, as early as Dec. 20, 1862, he had settled upon the land, and had ever since resided on it; that it was not surveyed until Aug. 11, 1866; that he had filed and proved his pre-emption claim to it Nov. 6, 1866; and paid for it, and received a patent certificate, on which his patent was duly issued.

The court excluded this evidence, and gave judgment for the defendant, which was affirmed by the Supreme Court; whereupon the plaintiff sued out this writ of error. The sections of

the act which bear upon the case are set forth in the opinion of the court.

Mr. Philip Philips, *Mr. S. M. Wilson*, and *Mr. George A. Nourse*, for the plaintiff in error.

1. It was competent for the plaintiff to show that the State, at the date of her patent to the defendant, had no title to the lands in controversy. *Polk's Lessee* v. *Wendell*, 9 Cranch, 87; *Patterson* v. *Winn*, 11 Wheat. 381; *Patterson* v. *Tatum*, Pacific Law Reporter, Oct. 6, 1874; *Doll* v. *Meader*, 16 Cal. 295; *Terry* v. *Megerle*, 24 id. 609; *Reichart* v. *Felps*, 6 Wall. 160; *Norton* v. *Nebraska*, 21 id. 660.

2. The legal title to sections sixteen and thirty-six did not vest in the State until they were marked out and defined by survey. Until then the grant to her was in the nature of a float. *Middleton* v. *Lowe*, 30 Cal. 596; *Railroad* v. *Fremont County*, 9 Wall. 94; *Gaines* v. *Nicholson*, 9 How. 356; *Cooper* v. *Roberts*, 18 id. 173. The settlement of the plaintiff, having been made before such survey, was within the exception contained in the seventh section of the act of 1853. The grant, therefore, did not embrace the lands covered by that settlement, and the patent of the State was an absolute nullity.

3. The intention of Congress to protect pre-emption settlements made on school sections before such survey is clearly manifested by the provision authorizing the State to select other lands in lieu of those on which such settlements were made.

Mr. Montgomery Blair for the defendant in error.

1. The grant of sections sixteen and thirty-six was *in præsenti*. No settlement on the lands in controversy having been made by the plaintiff at the date of the act, or within one year thereafter, they were not excepted from the grant. *Houghton* v. *Higgins*, 25 Cal. 255; *Doll* v. *Meader*, 16 id. 296; *Van Volkenburg* v. *McCleud*, 21 id. 330; *Summers* v. *Dickinson*, 9 id. 554; *Owen* v. *Jackson*, id. 322; *Keeran* v. *Griffith*, 27 id. 87; *Robinson* v. *Forest*, 29 id. 317; *Bludworth* v. *Lake*, 23 id. 255; *Mezerle* v. *Ashe*, 27 id. 328; 33 id. 74; *Rutherford* v. *Greene*, 2 Wheat. 196.

2. Although a survey was required to identify these sections by specific boundaries, a vested interest passed to the State by

force of the act of 1853. The doctrine of relation has been uniformly applied when executive acts, whether by survey or patent, are required to give full effect to a grant. The title, whenever they are completed, inures as of the date of the inception of the grant, and defeats all intervening claims. *Landis* v. *Brant*, 10 How. 373; *Kissell* v. *The Public Schools*, 18 id. 19; *Cooper* v. *Roberts*, id. 173; *Chouteau* v. *Gibson*, 13 Wall. 92; *Maguire* v. *Tyler*, 8 id. 650; *Railroad Company* v. *Smith*, 9 id. 95; *Veeder* v. *Guppy*, 3 Wis. 502.

It is said, on the other side, that the grant does not attach to the school sections till they are surveyed, because till then there were no such sections. This proves too much. If the thing granted did not exist, or was not described with certainty, the grant would be void, which is not the argument. The thing granted is the *land*, which did exist. "Section" is only a word of description, but it is a certain and enduring description; and a grant of a particular section is equally operative to appropriate it, whether its lines have been already run, or are hereafter to be run in the same manner, making the location only a question of measurement and calculation. Hence the description is as complete in the one case as in the other, and is so treated by the law; for the grant applies in terms to the "surveyed and to the unsurveyed land." As much violence is done to the language by withholding the "*unsurveyed*" lands from the schools as by denying them to pre-emptors.

3. Subsequent acts extending the permission to settle upon unsurveyed lands have no bearing upon this case. They cannot operate to recall the grant of 1853, or impair the rights which the State acquired under it. The government cannot resume its grants. *New Orleans* v. *De Armas*, 9 Pet. 224.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court.

The contest in this case is between a patent of the United States and a patent of the State of California. To determine which of them conveyed, under the facts offered in evidence, the title to the land in controversy, a construction of the act of 1853 is required. It is entitled "An Act to provide for the survey of the public lands in California, the granting of pre-

emption rights therein, and for other purposes," and is the first act of Congress which extended the land system of the United States over the newly acquired territory of that State. It provided for surveys, for sales, for the protection of the rights of settlers, miners, and others; and, among the other purposes mentioned in the caption, for magnificent donations to the State of lands for schools and for public buildings.

The sixth and seventh sections of the act are of chief importance in the matter under consideration; the preceding sections having provided for surveying all the lands. The clause of the sixth section, in which the grant to the State of the sixteenth and thirty-sixth sections for school purposes is found, reads as follows: —

"All the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township; and, with the exception of lands appropriated under this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of the 4th of September, 1841, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed."

Then come several provisos, which we will consider hereafter; but we pause here to note the effect of this granting and excepting clause on the lands which should, by the future surveys of the government, be found to be sections sixteen and thirty-six.

It is obviously the main purpose of the section to declare, that after the lands are surveyed they shall be subject to sale, according to the general land system of the government; and, secondly, to subject them to the right of pre-emption as defined by the act of 1841, and to extend that right to lands unsurveyed as well as to those surveyed. But here it seemed to occur to the framer of the act, that California, like other States in which

public lands lay, ought to have the sixteenth and thirty-sixth sections of each township for school purposes, and that they should not be liable to the *general pre-emption* law, as other public lands of the government would be. He accordingly injected into the sentence the grant of these lands to the State, and the exception of them from the operation of the pre-emption law of 1841, together with other lands which in like manner were neither to be sold nor made subject to pre-emption. These were, lands appropriated under the authority of that act, or reserved by competent authority; lands claimed under any foreign grant or title (*i.e.*, Mexican grants); and mineral lands. All these were by this clause exempted from sale and from the general operation of the pre-emption laws.

But the experience of the operation of our land system in other States suggested that it might be ten or twenty, and in some instances thirty, years before all the surveys would be completed and the precise location of each school section known. In the mean time, the State was rapidly filling up by actual settlers, whose necessities required improvements, which, when found to be located on a school section, should have some protection. What it should be, and how the relative rights of the settler and of the State should be also protected under these circumstances, is the subject of a distinct section of the act, — the one succeeding that we have just considered.

That section (7) provides: "That when any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections *before the same shall be surveyed*, or when such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof." That it was the purpose of this section to provide a rule for the exercise of the right of pre-emption to the school lands granted by the previous section cannot be doubted. The reason for this is equally clear; namely, that these lands were not only granted away by the preceding section and inchoate rights conferred on the State, but they were, with other classes of lands, by express terms excepted out of the operation of the pre-emption laws which

it was a principal object of that section to extend to the public lands of California generally.

Whether a settler on these school lands must have all the qualifications required by the act of 1841, as being the head of a family, a citizen of the United States, &c., or whether the settlement, occupation, and cultivation must be precisely the same as required by that act, we need not stop to inquire. It is very plain, that, by the seventh section, so far as related to the date of the settlement, it was sufficient if it was found to exist at the time the surveys were made which determined its locality; and, as to its nature, that it was sufficient if it was by the erection of a dwelling-house, or by the cultivation of any portion of the land. These things being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and, being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other land agreeably to the act of 1826, subject to the approval of the Secretary of the Interior.

But it is said that the right of pre-emption thus granted by the seventh section was subject to the limitation prescribed by the third proviso to the sixth section; namely, "that nothing in this act shall be construed to authorize any settlement to be made on any public lands not surveyed, unless the same be made within one year from the passage of this act; nor shall any right of such settler be recognized by virtue of any settlement or improvement made of such unsurveyed lands subsequent to that day." And such was the opinion of the Supreme Court of California. And that court, assuming this to be true, further held, that the grant made by the act of the school sections was a present grant, vesting the title in the State to the sixteenth and thirty-sixth sections absolutely, as fast as the townships were surveyed and sectionized. *Higgins* v. *Houghton*, 25 Cal. 252. As a deduction from these premises, it held, that the right to pre-emption on these lands expired with the lapse of the year from the passage of the act, and that no subsequent act of Congress could revive or extend it, even if it was so intended.

But we are of opinion that the first of this series of propositions is untenable.

The terms of the proviso to the sixth section, and those of the seventh section, if to be applied to the same class of lands, are in conflict with each other. The one says, that if settlement be made on land *before the survey*, which by that survey is found to be on the sixteenth or thirty-sixth section, the settlement shall be protected. The other says, that no settlement shall be protected unless made within one year after the passage of the act. In view of the well-known fact that none of these surveys would be completed under several years, the provision of the seventh section was a useless and barren concession to the settler, if to be exercised within a year, and, in the history of land-titles in that State, would have amounted to nothing. This apparent conflict is reconciled by holding to the natural construction of the language and the reasonable purpose of Congress, by which the limitation of one year to the right of pre-emption in the sixth section is applicable alone to the general body of the public lands not granted away, and not excepted out of the operation of the pre-emption law of 1841, as the school lands were, by the very terms of the previous part of the section; while sect. 7 is left to control the right of pre-emption to the school sections, as it purports to do.

In this view of the matter, the very learned argument of counsel on the question of the character of the grant as to the time when the title vests in the State, and the copious reference to the acts of Congress and of the State, as authorizing pre-emption after the expiration of one year from the date of the statute, are immaterial to the issue. Actual settlement before survey made accompanied the grant as a qualifying limitation of the right of the State, which she was bound to recognize when it was found to exist, and for which she was authorized to seek indemnity in another quarter. There is, therefore, no necessity for any additional legislation by Congress to secure the pre-emption right as to school sections, and no question as to whether it has so legislated, or whether such legislation would be valid; and we do not enter on those questions.

No question is made in the argument here, none seems to

have been made in the Supreme Court of the State, and none is to be found in its opinion in the case, as to the admissibility of the rejected testimony, if the fact which it sought to establish could be recognized by the court. Nor do we think such objection, if made, is sustainable. The testimony offered does not go to impeach or contradict the patent of the United States, or vary its meaning. Its object was to show that the State of California, when she made her conveyance of the land to defendant, had no title to it; that she never had; and that by the terms of the act of Congress, under which she claimed, the only right she ever had in regard to this tract was to seek other land in lieu of it. The effect of the evidence was to show that the title set up by defendant under the State was void, — not merely voidable, but void *ab initio*. For this purpose, it was competent, and it was sufficient; for it showed, that when the survey was actually made, and the land in question was found to be part of section thirty-six, plaintiff had made a settlement on it, within the meaning of the seventh section of the act of 1853, and the State could do nothing but seek indemnity in other land.

It has always been held, that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a court of equity to have it so declared. *Stodard* v. *Chambers*, 2 How. 317; *Easton* v. *Salisbury*, 21 id. 426; *Reichart* v. *Felps*, 6 Wall. 160.

Judgment reversed, and case remanded with direction to order a new trial in conformity to the principles of this opinion.

MR. JUSTICE FIELD took no part in the decision of this case.

MORGAN v. LOUISIANA.

1. Upon a sale of the property and franchises of a railroad corporation under a decree founded upon a mortgage which in terms covers the franchises, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company provided in the act of incorporation does not accompany the property in its transfer to the purchaser. The immunity from taxation in such cases is a personal privilege of the company, and not transferable.
2. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. Immunity from taxation is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property.

ERROR to the Supreme Court of the State of Louisiana.

This was an action by the State of Louisiana against Morgan, to recover certain taxes.

The facts are stated in the opinion of the court.

The judgment below was in favor of the plaintiff. The defendant thereupon sued out this writ of error.

Submitted on printed arguments by *Mr. Henry J. Leovy* for the plaintiff in error.

1. The legislature of Louisiana had power to exempt the property from taxation; and the grant made in this case was a contract which was inviolable. *New Jersey* v. *Wilson*, 7 Cranch, 164; *Jefferson Bank* v. *Shelly*, 1 Black, 536; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Wilmington Railroad* v. *Reid*, 13 id. 264, 269; *Humphrey* v. *Pegues*, 16 id. 244; 18 id. 392; 20 id. 36; 21 id. 492; Lacey's Dig. Railway Decisions, p. 853; 31 Ill. 484; 17 id. 291.

2. Exemption from taxation is a franchise that may be mortgaged and sold, especially in Louisiana. La. Stat. 1853, 1854, 1856; Civil Code, arts. 2449, 3183; *New Jersey* v. *Wilson*, 7 Cranch, 165; *Jefferson Bank* v. *Shelly*, 1 Black, 536; *Home of the Friendless* v. *Rouse*, 8 Wall. 430; *Trask* v. *Maguire*, 18 id. 392; *Pacific Railroad* v. *Maguire*, 20 id. 36; *Humphrey* v. *Pegues*, 16 id. 244; 13 id. 269; *Wilmington Railroad* v. *Reid*, 13 id. 264; *Bardstown & Louisville R. R. Co.* v. *Metcalfe*, 4 Ky. (Met.) 199; *Allen* v. *Mont. R. R. Co.*, 11 Ala. 437;

Pollard v. *Maddox*, 28 id. 321; 30 Vt. 182; 70 Penn. 355; *St. Paul Co.* v. *Parker*, 14 Minn. 297; Lacey's Dig. Railway Decisions, 753; *Union Bank Case*, 6 Humph. 515; *Enfield* v. *Hart*, 17 Conn. 40.

Plaintiff in error is the owner by purchase at public sale of all the property formerly owned by the railroad company, including all its franchises; and his title to the same has in no manner been forfeited.

3. The exemption from taxation of the capital stock of the company is without limitation; but that part invested in works, fixtures, workshops, &c., is exempt till ten years after completion of the road, &c. Sect. 2, Act 1853. It is admitted that the capital stock is exempt for ever. The "capital stock" is the capital of the company, whether remaining in money or invested in the necessary real estate, rails, and track, in grading, and in laying rails. *Trask* v. *Maguire*, 18 Wall. 391; *Wilmington Railroad* v. *Reid*, 13 id. 264; *Pacific Railroad* v. *Maguire*, 20 id. 42.

The tax claimed in this case is for $400,000, real estate (part of the road), $300,000, capital, and $19,000, ferry-boats; in all, $719,000. All this is clearly part of the capital stock exempted from taxation.

Mr. J. Q. A. Fellows for the defendant in error.

As the first grand division of eighty miles of road, purchased by the plaintiff in error at the marshal's sale in May, 1869, had been completed for more than ten years prior to that time, it was not exempt from taxation, and his purchase of the remaining property of the railroad company at the sheriff's sale in March, 1870, did not, and could not, include the franchises of the company.

Only by virtue of an express authorization of the legislature can the franchises of a corporation be divested. This was not the case at the sheriff's sale, made in the execution of an ordinary judgment on an ordinary debt against the railroad company. 1 Redf. Railw. c. 7, p. 117 (ed. 1873); 2 id. c. 7, pp. 484, 501 (ed. 1873); Lacey's Dig. Railway Decisions, p. 292, Nos. 4, 7, 21, 25; *Plymouth Railroad* v. *Colwell*, 39 Penn. St. 337; *State* v. *Rives*, 5 Ired. 297; *Benedict* v. *Heineberg*, 43 Vt. 231; *State* v. *Mexican Gulf Railroad Co.*, 3 Rob. (La.) 513.

The plaintiff in error could buy at the sheriff's sale only the tangible property of the railroad company, and not any of its franchises. He therefore did not acquire the right of exemption from taxation of the property purchased previously at the marshal's sale; even if such exemption be a franchise, and not a strictly personal right or immunity, which is neither transferable by the railroad company, nor subject to seizure and sale under execution.

The plaintiff in error can therefore claim only by virtue of his purchase at the marshal's sale, under the laws as they existed at the time of his purchase.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action by the State of Louisiana to recover of the defendant taxes levied upon his property for the years 1870 and 1871. The defendant contends that the property was exempt from taxation in his hands, because it was thus exempt whilst held by the New Orleans, Opelousas, and Great Western Railroad Company, from whom it was acquired in part by purchase at a mortgage sale, and in part by purchase at a sheriff's sale upon a money judgment. The facts upon which the defendant relies are substantially these: By an act passed in April, 1853, the legislature of Louisiana incorporated the New Orleans, Opelousas, and Great Western Railroad Company, for the purpose of constructing, working, and maintaining a railroad from Algiers, opposite New Orleans, westward to Berwick's Bay, and thence to Washington, in the parish of St. Landry, to be afterwards extended to a point on the Sabine River most favorable for the purpose of continuing the road through the State of Texas to El Paso on the Rio Grande.

The act provided that the capital stock of the company should be exempt from taxation, and that the works, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances of the company, should be exempt from taxation for ten years after the completion of the road within the limits of the State; and that the president, engineers, clerks, agents, and servants of the company, should be exempt from jury duty, and from military duty, except in case of invasion or insurrection.

The company was authorized to borrow, from time to time, such sums as might be required for the construction of the road above the amount received from subscriptions to its capital stock, not exceeding $6,000,000, and to secure the loans by mortgaging its property in whole or in part, as might be deemed expedient. Subsequently, in 1856, the legislature passed a general law extending the powers of railroad companies, and providing that, in addition to those already conferred, any railroad company established under the laws of the State might borrow, from time to time, such sums of money as might be required for the construction or repairs of any railroad, and for that purpose might issue bonds or obligations secured by mortgage on the property and franchises of the company, and payable at such times and places as its president and directors might designate.

In 1857 the road of the company was completed as far as Berwick's Bay, a distance of eighty miles from New Orleans; and, to obtain funds to continue its construction beyond that point, the directors, in March, 1859, authorized the president to issue two thousand bonds of the company, in sums of $1000 each, and to secure their payment and interest by a first mortgage on the portion of the road completed, together with the land over which the road was constructed, the equipments, appurtenances, rights, and franchises of the company applicable to that portion. Under this authority the bonds were issued and the mortgage executed in April, 1859. With the funds raised by this means work on the road was resumed, and its grading was nearly completed to Opelousas, a distance of eighty miles beyond Berwick's Bay, when, in 1862, the work was discontinued, the road having been seized by the military forces of the United States, by whom it was held until February, 1866, when it was restored to the company. Since its restoration no further work has been done, and the construction of the portion of the road beyond Opelousas to the Sabine River has never been commenced.

The defendant was the owner of several hundred of the mortgage bonds issued; and their coupons not being paid, proceedings were, in 1869, instituted by him in the Circuit Court of the United States for the sale of the mortgaged property, which

resulted in the issue of executory process to the marshal of the district. At the sale made by that officer, the defendant became the purchaser of the completed division of the road, and the equipments and franchises appertaining to that division, with its cars, locomotives, machinery, utensils, and effects generally. The proceeds received not covering the entire indebtedness of the company, suits were instituted by several bondholders in the State courts for the amount due them, and judgments were recovered, under which the balance of the property of the company, including the franchises appertaining thereto, were sold by the sheriff of New Orleans, and were purchased by the defendant.

The mortgage of the company in terms covered its franchises, so far as they appertained to the completed portion or division of the road, from Algiers to Berwick's Bay; the sale of the marshal upon the executory process followed the terms of the mortgage in the description of the property sold; and the sheriff, upon the judgments of the State court, undertook to sell and convey with other property the franchises of the company appertaining to the road beyond Berwick's Bay to the Sabine River. The question presented is, whether, under the designation of franchises, the immunity from taxation upon its property possessed by the railroad company accompanied the property in its transfer to the defendant, or whether that immunity was a mere personal privilege of the company, and, therefore, not transferable to others. The Supreme Court of the State took the latter view, and held that the exemption did not attach to the property of the corporation so as to follow it into the hands of third parties. In this view we agree with the State court. The greater part of the property outside of the capital stock was liable to constant waste, deterioration, and destruction, and, according to the ordinary course of business, would be disposed of by the company as new works were required. It can hardly be supposed that the legislature intended that the exemption should follow the fixtures and vehicles of the company after they had passed out of its control, so that, wherever found, the power of taxation could not touch them; or, that workshops and warehouses ceasing to be the property of the company should carry to its subsequent posses-

sors a privilege intended only for the benefit of the corporation. The language of the statute requires no such construction, and intendments will not be indulged to enlarge the operation of a clause restraining the exercise of a sovereign attribute of a State. As has been often said by this court, the whole community is interested in retaining the power of taxation undiminished, and has a right to insist that its abandonment shall not be presumed in any case where the deliberate purpose of the State to abandon it does not appear. *Providence Bank* v. *Billings*, 4 Pet. 561; *The Delaware Railroad Tax*, 18 Wall. 206. Here no such purpose appears. Here it is the capital stock of the company, and its works, fixtures, workshops, warehouses, vehicles of transportation and appurtenances, which the statute declares shall be exempt; evidently meaning that it is to the property of the company, so long as it remains such, that the exemption shall apply. This view is strengthened by the provision exempting the president, engineers, clerks, agents, and servants of the company from jury and military duty. No one would pretend that such exemption attended the individuals after they had ceased to be officers and servants of the company. The exemption of the property of the company from taxation, and the exemption of its officers and servants from jury and military duty, were both intended for the benefit of the company, and its benefit alone. In their personal character they are analogous to the exemptions from execution of certain property of debtors, made by laws of several of the States. Thus, in some States, a limited quantity of household and kitchen furniture, the tools of a mechanic, the tent and pick of a miner, the farming utensils of a husbandman, the instruments of a surgeon and dentist, and the law library of an attorney and counsellor, — are exempt from execution. In these and similar cases it has never been pretended that the exemption attached to the property continued when the ownership of the debtor ceased. The condition of the exemption in terms makes the exemption applicable to the property only so long as that belongs to the debtor. A similar condition attached by its terms to the exemption from taxation of the property of the railroad company here, and a like result must be deemed to have followed its change of ownership. In our judgment, the

exemption ceased when the property of the company passed to the defendant.

Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term "franchises." It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a "franchise," and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction.

The cases cited by counsel are not in conflict with this view. In *New Jersey* v. *Wilson*, 7 Cranch, 164, the land purchased by the State from the Indians was by the statute exempted from subsequent taxation without reference to its ownership. The privilege, said the court, though for the benefit of the Indians, was annexed by the terms which created it to the land itself, and not to the persons. In the case of *Home of the Friendless* v. *Rouse*, 8 Wall. 430, a statute of Missouri incorporating a charitable institution exempted its property from taxation; and the court held that the charter was a contract between the State and the corporators, that the property given for charitable uses specified in it should, so long as it was applied to those uses, be exempted from taxation. This decision accords with the view we have taken in this case of the operation of the exemption clause. The case of *Wilmington Railroad* v. *Reid*, 13 Wall. 264, only asserts the doctrine that it is competent for the legislature to exempt property from taxation,

and that the exemption, when made in a charter of a corporation, constitutes a contract, the question there being whether subsequent legislation impaired the obligation of such contract.

In *Trask* v. *Maguire*, 18 Wall. 391, the act of Missouri, under which a sale of the St. Louis and Iron Mountain Railroad was made by commissioners of the State, provided that the purchasers should have all the rights, franchises, privileges, and *immunities* enjoyed by the defaulting company. The new company was, therefore, necessarily held to have acquired the immunity from taxation which the original company had possessed, if it were competent for the legislature at the time under the new constitution, to confer this privilege. It was decided, however, that the legislature was prohibited by the constitution from conferring the privilege, and that the law, passed under the ordinance adopted with the new constitution, providing for a sale of the franchises of a defaulting railroad company with its road, did not require immunity from taxation to be embraced within them; the language being construed to refer to such franchises as were essential to the operation of the road sold, and without which the ownership of the road would be comparatively valueless, — a view which accords with what we have said in this case.

Immunity of particular property from taxation is a privilege which may sometimes be transferred under that designation, as held in *Humphrey* v. *Pegues*, 16 Wall. 244. All that we now decide is, that such immunity is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property.

The views we have expressed render it unnecessary to consider whether the neglect for years of the company to prosecute its work, accompanied by the fact that it has become insolvent, and all its property has been disposed of at forced sales, does not warrant the conclusion that any further attempt to complete the road to the Sabine River has been abandoned.

Judgment affirmed.

GRANT, COLLECTOR, v. HARTFORD AND NEW HAVEN RAILROAD COMPANY.

The expression "profits used in construction" (within the meaning of the one hundred and twenty-second section of the Internal Revenue Act of June 30, 1864, 13 Stat. 284) does not embrace earnings expended in repairs for keeping the property up to its normal condition, but has reference to new constructions adding to the permanent value of the capital; and when these are made to take the place of prior structures, it includes only the increased value of the new over the old, when in good repair.

ERROR to the Circuit Court of the United States for the District of Connecticut.

This action was brought by the Hartford and New Haven Railroad Company against Henry A. Grant, collector of internal revenue for the first district of Connecticut, to recover the sum of $2,785.65 income tax, and $139.28 penalty, paid to him under protest in January, 1868. The controversy arose upon the question of the company's income for the two fiscal years ending Aug. 31, 1867. During that period they expended from their earnings $55,712.60, in constructing over the Farmington River at Windsor a new stone bridge, to be used in place of a wooden bridge which was deemed insecure; and they charged the amount to current expenses. The assessor of internal revenue for the district insisted that this sum should have been charged to account of construction, and was fairly to be regarded as "*profits used in construction*," within the meaning of the one hundred and twenty-second section of the act of June 30, 1864; and, therefore, he made a special assessment of the amount. The company having appealed to the commissioner of internal revenue without effect, this action was brought.

A jury having been waived, the cause was tried by the court, which found specially an agreed statement of facts. From this it appears that the amount charged to current expenses during each of the two years in question (including together the said sum of $55,712.60) was not greater than the proper ordinary current expenses and depreciation of the entire property; and that the company returned the entire balance of their gross earnings over and above said expenses, in the shape of dividends and surplus, and paid the regular tax thereon.

Judgment having been rendered in favor of the company, the collector sued out this writ of error.

Argued by *Mr. Assistant Attorney-General Smith* for the plaintiff in error.

The "profit" of any business is the surplus remaining, after deducting from its gross receipts the necessary expenses of carrying it on, whether such surplus be retained in money or invested in addition to or improvement of the stock, or in other property.

The policy of Congress in the act which governs this case was to tax *all* gains and profits, whether divided or undivided. *Collector* v. *Hubbard*, 12 Wall. 17.

The stone bridge was an entirely new structure, a permanent improvement, for carrying on the business of the company. It was erected out of their profits, which were thus "used in construction," and not in repairs. Its total cost was properly assessed.

Mr. R. D. Hubbard for the defendant in error.

The profits of a railroad company cannot be claimed to be any thing more than the income remaining after satisfying a fair expense account.

The bridge was not intended to work an enlargement of the scope of the company's business. An unsafe structure was merely replaced by a better one.

The mere fact of its being more valuable adds nothing to the taxable or divisible profits of the company.

But the conceded facts render the preceding points wholly unnecessary.

The company charged no more for expenses and depreciation of their property in these two years than was "proper to cover such expenses and such depreciation."

The closest analogies to the question now under discussion have arisen under the construction of the English poor-law. By the Parochial Assessments Act (6 & 7 Will. IV. c. 96), rates for the relief of the poor in England and Wales are to be made upon an estimate of the *net annual value* of the several hereditaments rated thereunto, — that is to say, of the rent at which the same might reasonably be expected to let from year to year, — deducting therefrom the probable annual

average cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent. Under this act the railway companies are chargeable. We submit that this law provides for no deduction which an honest railway management ought not to make before counting its profits. In getting at the net annual value of the several properties, the English courts hold, that a "percentage on the gross receipts for annual depreciation of stock beyond ordinary annual repairs," is to be made before coming at the taxable income (*Reg.* v. *Grand Junction Ry. Co.*, 4 Ad. & E. N. S. 18); that another deduction is to be made, of "an annual sum per mile, for the renewal and reproduction of the rails, sleepers," &c. (id.; *Reg.* v. *G. W. Ry. Co.*, 15 Q. B. 1085); and that the company is entitled to deduction of a fair percentage for depreciation, reproduction, &c., although the amount has not been actually expended (*Reg.* v. *Lond., Bright., & So. C. Ry. Co.*, and several other cases following, reported in 15 Q. B. 313.)

MR. JUSTICE BRADLEY delivered the opinion of the court.

The company having returned the entire balance of their gross earnings over and above current expenses, in the shape of dividends and surplus, for the period in question, and paid the regular tax thereon, we do not see why this was not a full compliance with the law. The object of the law was to impose a tax on net income, or profits, only; and that cannot be regarded as net income, or profits, which is required and expended to keep the property up in its usual condition proper for operation. Such expenditure is properly classed with repairs, which are a part of the current expenses. If a railroad company should make a second track when they had but a single track before, this would be a betterment or permanent improvement, and, if paid out of the earnings, would be fairly characterized as "profits used in construction." The works of the company would have an additional value to what they had before, with an increased capacity for producing future profits. This kind of expenditure is what Congress meant to reach, when, in the one hundred and twenty-second section referred to, it imposed a tax not only on the dividends of every railroad, canal,

and turnpike company, but also on "all profits of such company carried to the account of any fund, or used for construction."

The counsel for the government insists that this bridge was a betterment, because it was much more valuable than the old wooden bridge. But the assessor did not include the excess merely: he assessed the whole expenditure bestowed upon the new bridge, without making any allowance for the old one. His idea seems to have been, that all earnings used in new constructions are made taxable by the act, without reference to betterments, or to their being substituted for other constructions. Indeed, his assessment is not for "*profits* used in construction," but for "*earnings* used in constructing new Windsor Bridge, $55,712.60." In this view he was decidedly wrong. Earnings expended on a new structure may or may not be profits. Whether they are or not depends on other things to be taken into the account besides the mere fact of such expenditure. Had the assessment been merely for the increased value of the new bridge over the old one when in good repair, the case might have admitted of very different consideration.

Judgment affirmed.

HORNOR v. HENNING ET AL.

The act of Congress (16 Stat. 98), under which certain corporations are organized in the District of Columbia, contains a provision, that, "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." *Held*, 1. That an action at law cannot be sustained by one creditor among many for the liability thus created, or for any part of it, but that the remedy is in equity. 2. That this excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of its debts.

ERROR to the Supreme Court of the District of Columbia.

The plaintiff in error, who was plaintiff below, had judgment against him on demurrer to his declaration. The substance of the declaration is, that he is a creditor of the Washington City Savings-Bank; that the bank had incurred an indebtedness of $850,000 in excess of the amount of its capital stock, with the

assent of the defendants, who were the trustees of said bank, by reason whereof a right of action had accrued to plaintiff to have and recover the amount of his debt, — to wit, $4,000.

The act of Congress of May 5, 1870 (16 Stat. 98), authorizes the formation of corporations for various purposes within the District of Columbia by the voluntary association of individuals, who shall pursue the directions of the statute on the subject. Sect. 4 of that act provides for manufacturing, agricultural, mining, and mechanical corporations, and contains several provisions on the subject of the liability of the stockholders and of the trustees who manage these corporations. One of these is, that "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company."

By the second section of an act of the same session, passed June 17, 1870 (16 Stat. 153), it was enacted that savings-banks might be organized under the provisions of sect. 4 of the act first mentioned, which contains the clause above recited; and it is on the liability of the trustees declared in this clause that plaintiff bases his cause of action.

Argued by *Mr. F. P. Cuppy* for the plaintiff in error.

1. The act of June 17, 1870, merely authorizes savings-banks to organize and do business under the provisions of sect. 4 of the act of May 5, 1870; therefore, in construing the act as applied to trustees of such banks, the rules of construction applicable to the liability of trustees of mercantile, mining, and other companies, under the first act, should be applied.

2. The right of action is separate and several in favor of each and every creditor.

3. The liability is a joint liability, to which all the trustees assenting to an excess of indebtedness over the amount of the capital stock may be subjected.

4. The statute does not designate or prescribe, expressly or by implication, the form of the remedy to which the creditor shall resort. He therefore has the right to elect that which may be appropriate, under the circumstances of his particular case.

5. In the case at bar, an action at law lies in favor of the

plaintiff against the defendants, for the amount of his debt and interest. Debt is the proper form of such action. 3 Paige, 409, 415, 416; *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473; *Garrison* v. *Howe*, 17 N. Y. 458; *Simmons* v. *Spencer*, 15 id. 548; *Chandler* v. *Hoag*, 2 Hun (N. Y.), 613; *Union Iron Co.* v. *Pierce et al.*, 4 Biss. 327; *Dozier* v. *Thornton*, 19 Ga. 325; *Bullard* v. *Bell*, 1 Mas. 243; *Culver* v. *National Bank of Chicago*, 64 Ill. 530; *Steele* v. *Dunne*, 65 id. 298.

Mr. Walter D. Davidge for the defendants in error.

The liability claimed is purely statutory. It did not exist at common law. The liability of the trustees is solely for the *excess* of indebtedness, and to the creditors of the company, one of whom cannot maintain an action for his individual debt. The whole scheme of the provision is the creation of a fund for the benefit of all the creditors of the company. *Sturgis* v. *Burton*, 8 Ohio St. 215; *Merchants' Bank* v. *Stevenson*, 10 Gray, 232; *Stevenson* v. *Merchants' Bank*, 5 Allen, 398; *Moore* v. *Reynolds*, 109 Mass. 473; *Harris* v. *The First Parish of Dorchester*, 23 Pick. 112; *Crease* v. *Babcock*, 10 Met. 531; Morse on Banking, pp. 438, 439, and cases cited; *Pollard* v. *Bailey*, 20 Wall. 520.

The remedy being in equity, the demurrer was properly sustained.

MR. JUSTICE MILLER delivered the opinion of the court.

The demurrer questions the right of a single creditor among many of the corporation to bring his separate action at law for his own debt, and recover a judgment for it against the trustees, though the allegations of his declaration be true.

If there exists an indebtedness of $850,000 in excess of the capital stock (which is alleged to be $50,000), it is clear that there must be other creditors than plaintiff; and as plaintiff's account, filed as part of the declaration, shows that he claims as a depositor in the bank, it is a reasonable inference that there are a great many other creditors, and that most of them are depositors of small sums. Under these circumstances, conceding the liability of the defendants, several questions press themselves on our attention as to the nature and extent of this liability and the mode of its enforcement. Taking the terms

of the statute literally, the trustees are liable to the creditors as a body in the full sum of the excess (in this case $850,000), without regard to the amount due them collectively or individually, and though the corporation may be willing and able to pay every debt it owes as it falls due or is demanded. Nor does it matter whether the debts are in excess at the time the suit is brought or not, for "if at any time" the indebtedness exceeds the capital stock, the assenting trustees are liable. Nor by the strict terms of the clause are the defendants liable to a single creditor, if there be more than one, but to all, — not to each creditor for the amount of his debt, but to all the creditors for the amount of the excess.

Yet in the face of this necessary result, if the literal construction be adopted, plaintiff in error maintains that the excess of indebtedness incurred above the capital is to be treated as a penalty, and that *any* creditor can sue for that penalty without regard to the rights of the others. If the action is to recover a penalty, the defendants can only be liable to one action and to one penalty; and the recovery by plaintiff, if he had the right to recover, could be pleaded in bar of any other action for the same penalty.

But it is not readily to be believed that Congress intended to make the trustees liable beyond the debts of the bank, which it failed or refused to pay; yet if the excess is a penalty, it would be no defence for the directors to plead that the bank was ready and willing, and had never refused, to pay when demand was made. In fact, while the bank, *outside of its capital stock*, may have had $1,000,000 in its vaults ready to pay, a single creditor, who had never demanded his money of the bank, could sue the trustees.

Nor can we believe that an act intended for the benefit of the creditors generally, when the bank proves insolvent, can be justly construed in such a manner that any one creditor can appropriate the whole or any part of this liability of the trustees to his own benefit, to the possible exclusion of all or of any part of the other creditors. But such may, and probably would, often be the result if any one creditor could sue alone, while there were others unsecured.

We are of opinion that the fair and reasonable construction

of the act is, that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended, that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts.

The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the trustees, and apportioned among the creditors, — in a manner which the trial by jury and the rigid rules of common-law proceedings render impossible.

This course avoids the injustice of many suits against defendants for the same liability, and the greater injustice of permitting one creditor to absorb all, or a very unequal portion, of the sum for which the trustees are liable; and it adjusts the rights of all concerned on the equitable principles which lie at the foundation of the statute.

Counsel for plaintiff cites a number of adjudged cases, mostly from the courts of New York, in which it is held that an action at law may be maintained against an individual stockholder in favor of an individual creditor under the statute of that State, that makes the stockholder liable to the amount of his stock when the corporation is insolvent. But there the liability of the stockholder is several, and is limited to the amount of his stock, a fixed sum easily ascertained. It is held in those courts, however, as stated in the *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473, that chancery has a concurrent jurisdiction; and in the case of *Van Hook* v. *Whitlock*, 3 Paige, Ch. 409, it was said that the remedy at law is a very imperfect one.

Without deciding whether we would follow those decisions in a similar case arising in this District, it is sufficient to say, that there is an obvious distinction between the liability of stockholders to the amount of their stock, which is a part of the obligation assumed when the stock is taken and which is an exact sum, ascertainable by the number of shares owned by the shareholder, and the case of the managing trustees, jointly liable for a violation of their trust to all the creditors of the corporation who may be injured thereby.

In the Supreme Judicial Court of Massachusetts, under the identical form of words which we are construing in the present case, it has been repeatedly decided that the only remedy is a suit in equity, in which all the creditors are parties; and that even in equity one creditor cannot sue alone, but must either join the other creditors, or bring his suit on behalf of himself and all the others. And while the case is considered in reference to remedies afforded by the statute, it is placed on the solid ground, that the fund, by the statute, consists of the excess of all debts over the capital, and that there are various parties having several and unequal claims against the fund, which exceed it in amount. A demurrer to the action at law was sustained on these grounds in the *Merchants' Bank of Newburyport* v. *Stevenson and Others*, 10 Gray, 232. See also *Crease* v. *Babcock*, 19 Met. 501; 5 Allen, 398. The same principle is held by this court in the recent case of *Pollard* v. *Bailey*, 20 Wall. 520, which, we think, disposes of the one before us.

Judgment affirmed.

YZNAGA DEL VALLE v. HARRISON ET AL.

As the Code of Practice of Louisiana provides that all definitive or final judgments must be signed by the judge rendering them, this court, under sect. 691 of the Revised Statutes, as amended by the act of Feb. 16, 1875 (18 Stat. 316), cannot, where the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs, review the judgment of a circuit court of the United States sitting in that State, signed subsequently to May 1, 1875.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the District of Louisiana.

Mr. Edward Janin for the defendants in error, in support of the motion.

Mr. Thomas J. Durant and *Mr. C. W. Hornor* for the plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The judgment in this case is for less than $5,000, and was given April 9, 1875. A motion for new trial, entered and filed April 13, was overruled, after argument, May 8. The judgment as given was signed by the judge May 10, 1875.

A motion to dismiss for want of jurisdiction is now made, because the matter in dispute is less than $5,000. This writ of error was issued under sect. 691 of the Revised Statutes, as amended by the act of Feb. 16, 1875 (18 Stat. 316), which provides for the re-examination in this court of all final judgments of the circuit courts rendered previous to May 1, 1875, where the matter in dispute exceeds the sum or value of $2,000, and of such as were rendered after that date where it exceeds $5,000. The only question presented by this motion is whether the judgment of the Circuit Court was "rendered" before or after May 1, 1875. If before, we have jurisdiction; if after, we have not.

By the Code of Practice of Louisiana, "the judge must sign all definitive or final judgments rendered by him; but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given." Art. 545, Code 1870; art. 546 of former Code. This, by the operation of sect. 914 of the Revised Statutes (which is a reproduction of sect. 6 of "An Act to further the administration of justice," passed June 1, 1872, 17 Stat. 197), is now by law a rule of practice for the courts of the United States within that State; and it seems, that, as early as 1828, the District Court of the United States in Louisiana had adopted it as a rule of that court. Such being the case, this court held, in *Life and Fire Insurance Company of New York* v. *Wilson's Heirs*, 8 Pet. 303, decided in 1834, that "the judgment, without the signature of the judge, cannot be enforced. It is not a final judgment on which a writ of error may issue for its reversal. Without the

action of the judge, the plaintiffs can take no step. . . . They can neither issue execution on the judgment, nor reverse the proceedings by writ of error." This is in accordance with the settled practice in Louisiana, and is decisive of this case. *Stark* v. *Burke*, 9 La. Ann. 345; *Sprigg* v. *Wells*, 5 Mart. N. S. 105; *Ex parte Nicholass*, 4 Rob. 58; *Mech. & Tr. Bank N. O.* v. *Walter*, 7 id. 451; *Succession of Arbridge*, 1 La. Ann. 207; *McWillie* v. *Perkins*, 20 id. 169. As only final judgments can be re-examined here upon writs of error, the judgment to be "rendered," which the statute refers to, must be the final judgment. That judgment is not rendered in Louisiana until it is signed by the judge. In other States, the rule in this respect may be different; and in *Silsby* v. *Foote*, 20 How. 295, we said, "The time to be taken as when the judgment or decree may be said to be rendered or passed may admit of some latitude, and may depend somewhat upon the usage and practice of the particular court." But this being a judgment in Louisiana, and not having been signed until after May 1, was not rendered, according to the practice in that State, before that date; and consequently the writ must be dismissed for want of jurisdiction.

SHAW v. UNITED STATES.

Where a steamer, lying at the time at the wharf at St. Louis, was taken into the service of the United States by a quartermaster of the United States, for a trip to different points on the Mississippi River, the compensation for the service required being stated at the time to the captain, and no objection being made to the service or compensation, and the service was rendered, the possession, command, and management of the steamer being retained by its owner, — *Held*, that the United States were charterers of the steamer upon a contract of affreightment, and that they were not liable, under such a contract, to the owner for the value of the steamer, though she was destroyed by fire whilst returning from the trip, without his fault.

APPEAL from the Court of Claims.

The court below found the facts as follows: —

That on the seventeenth day of September, 1863, the steamboat "Robert Campbell, Jr.," of which the claimant was and continued to be the sole owner, when lying at the wharf in the

port of St. Louis, Mo., fully manned, equipped, and furnished for business on the Mississippi River, was impressed into the military service of the United States by Captain Charles Parsons, assistant-quartermaster of the United States army, for especial duty between Memphis and Vicksburg, loaded with army stores and troops, and ordered by said Parsons to proceed down the Mississippi River to Memphis, Tenn., and there report to Captain J. V. Lewis, assistant-quartermaster. The orders stated the terms on which the boat was employed. The boat left St. Louis on said service about the 25th of that month, officered and manned by officers and men employed by the claimant.

While in the said service of the government she was, on the 28th of September, 1863, consumed by fire, and became a total loss to the claimant, without any fault or negligence on his part, or that of her officers or crew.

In October, 1863, the account of the United States with said boat, for her use and service as a transport from Sept. 17 to Sept. 28, was allowed and paid by Brigadier-General Robert Allen, quartermaster United States army.

In February, 1864, the claimant submitted to the third auditor of the treasury his claim for $70,000 against the United States, for the value of said boat at the time she was taken into the service of the government.

At the same time, he claimed a balance of $859.91, as due him on account of stores lost with the boat when she was consumed, and which he averred had been furnished by the officers of the boat for the subsistence of the crew.

At the time of her loss she was worth $70,000, and was insured for $25,000, by policies for $5,000, in each of the following companies; namely, the Atlantic Mutual Insurance Company, the Globe Mutual Insurance Company, the United States Insurance Company, the Eureka Insurance Company, and the Phœnix Insurance Company. In each policy, except that of the Atlantic Mutual Insurance Company, the boat was valued at $38,000; and in all of said policies there was a limitation of $30,000, as the total amount which was allowed to be insured on the boat.

In the policies issued by the Atlantic Mutual and United

States companies, the claimant was insured; but the policies stipulated that the loss, if any, should be paid to Robert Campbell; and the losses under those policies — viz., $5,000 under each — were paid to said Campbell.

In the policy issued by the Eureka the claimant was insured; but the policy stipulated that the loss, if any, should be paid to Robert Campbell & Co.; and the loss was so paid.

In the Phœnix and Globe policies the claimant was insured, and the losses thereunder were paid to him.

On the 25th of May, 1864, the third auditor rendered the following award in favor of the claimant: —

Award No. 32. — *Second Section of the Act of* 3*d March*, 1849.

"TREASURY DEPARTMENT,
"THIRD AUDITOR'S OFFICE, May 25, 1864.

"In pursuance of an act of Congress approved 3d of March, 1849, entitled 'An Act to provide for the payment of horses and other property lost or destroyed in the military service of the United States,' as amended and construed by the fifth section of the act of March 3, 1863, it is adjudged by me, that there is due from the United States to John S. Shaw, for the steamboat 'Robert Campbell, Jr.,' of St. Louis, Mo., burned on the Mississippi River, near Milliken's Bend, on the twenty-eighth day of September, 1863, while in the military service of the United States, under impressment, the sum of fifty-seven thousand dollars ($57,000), less the sum of twenty-five thousand dollars received by him as insurance on the same, leaving payable by the United States the sum of thirty-two thousand dollars ($32,000).

"To be paid to John S. Shaw, St. Louis, Mo.

"R. J. ATKINSON, *Third Auditor*."

On the 9th of June, 1864, the amount of said award was paid to the claimant.

In 1869, the claimant made an application to the third auditor to review the award, and allow the further sum of $13,859.90; which that officer refused to do: and his decision in that regard was concurred in by the second comptroller. That sum was, in the application, made up of the above-mentioned balance, claimed as due him on account of stores lost with the boat when she was consumed; and of $13,000, on account of the value of the boat, — which latter claim was made by estimating the

boat's value at $70,000, and allowing thereon $25,000 insurance money paid the claimant, and $32,000 paid him by the government as aforesaid, leaving $13,000 additional on the value claimed to be due to him.

The claimant's amended petition, praying for a recovery of the said sum of $25,000, for the use and benefit of said insurance companies, was, with the leave of the court, filed Aug. 26, 1873.

The court found as conclusions of law, —

1. That, on the facts therein, the "Robert Campbell, Jr.," when destroyed by fire, was employed by the petitioner in the performance of a contract of affreightment, then subsisting between him and the United States; and they are not liable for her value.

2. That the claim of the petitioner against the United States, submitted by him to the third auditor, was not within the jurisdiction or authority of said officer, under the statute of 3d March, 1849; and his action thereon imposed no liability on the United States, and none has been assumed by them.

Judgment was rendered accordingly; and the claimant appealed to this court.

Argued by *Mr. Joseph Casey* for the appellant.

The steamboat was in the military service of the United States by "impressment," and, having been destroyed by inevitable accident, without fault or neglect of the owner, the case is clearly within the acts of March 3, 1849, and March 3, 1863.

The fact of impressment and use creates an obligation to pay, from which an implied contract arises. *United States* v. *Russell*, 13 Wall. 623.

Mr. Assistant Attorney-General Smith for the appellee.

The claimant having remained in the possession, navigation, and command of his vessel, the arrangement was, in contemplation of law, a mere affreightment, sounding in a contract, and not a demise. *Reed* v. *United States*, 11 Wall. 600; *United States* v. *Russell*, 13 id. 623.

Being a contractor for the use of his vessel as a transport, neither the claimant nor his property was "in the military service of the United States," within the meaning of the acts of March 3, 1849 (9 Stat. 415), and March 3, 1863 (12 id. 743). *Guttman's Case*, 9 Ct. of Cl. 60.

MR. JUSTICE FIELD delivered the opinion of the court.

If we could import into the findings of the court the facts stated in its opinion and in the brief of appellant's counsel, this case would be presented for our consideration with much greater completeness than at present. It would then clearly appear, that what is termed an impressment of the vessel of the claimant into the military service of the United States was only a notice to its captain from the assistant-quartermaster at St. Louis that the government would *require* its service for a trip to Memphis, Vicksburg, and other points, accompanied with a statement of the *per diem* compensation which would be allowed for its use, and for the subsistence of the men in addition to their wages, and fuel for the vessel; to which notice and service no objection was made by the captain or the claimant. It would also appear, that the claimant entered upon the service with alacrity, and that, in conformity with the terms designated as compensation, his account was rendered to the United States, and paid. Under these circumstances, the transaction could only be treated as a voluntary arrangement, notwithstanding the peremptory tone on the part of the assistant quartermaster-general, with which the negotiation with the captain was opened.

In *Reed* v. *United States*, reported in the 11th of Wallace, the same military officer at St. Louis, the assistant-quartermaster, in June, 1865, applied to the owners of another steamer, to transport supplies from that port to Fort Berthold, on the Missouri; but they declined the service, on account of the lateness of the season. He then ordered them to prepare for the trip, informing them, that, in case of refusal, the vessel would be impressed. They protested; but, under the orders given, put the boat in readiness, received the cargo, and performed the service required. With the order to prepare for the trip, the assistant-quartermaster, as in this case, fixed the *per diem* compensation for the use of the vessel, which appears to have been satisfactory to the owners; for it was received by them without objection. Upon this state of facts the court held, that, though the owners originally objected to the service, they in fact rendered it as matter of contract upon the compensation fixed by the assistant-quartermaster; and that the vessel

having grounded on its return trip, and been destroyed whilst thus grounded by an ice freshet, no liability for its value attached to the United States, under the second section of the act of 1849 (9 Stat. 414), or the fifth section of the amendatory act of 1863 (12 id. 743). The fact that the steamer remained, in performing the trip required, under the control and management of its owners, was considered as conclusive that it was not in the service of the United States, within the meaning of those acts; and that a vessel could only be regarded as in such service when let to the government, and the owners had parted with its possession, command, and management. So long as the owners retained the possession, command, and management of the steamer, the United States were only charterers of the same upon a contract of affreightment, and liable as such, and were not clothed with the character or responsibility of ownership. And it was also held, that the adjudication of the third auditor in allowing, in supposed conformity with the acts mentioned, for the value of the vessel lost, could not have any influence upon the decision of the court.

The facts stated in the opinion of the Court of Claims, and by the appellant's counsel in his brief, bring the present case fully within the reasoning and authority of *Reed* v. *United States*. And although the findings in the record are defective in not stating the particulars of the contract, and it is found that the steamer was impressed into the military service, yet it distinctly appears that the terms upon which the vessel would be employed were stated at the time by the assistant-quartermaster, and that the vessel, whilst performing its service, was manned by officers and men engaged by the claimant, — that is, that the vessel was in his possession and under his command and management, and not in the possession or under the command and management of the United States; and that his account with the government for its use and service as a transport, until its destruction by fire, was allowed and paid. We must therefore hold, as was held in the case cited, that whatever the force or coercion may have been which attended the original impressment, as it is termed, the transaction ultimately ended in a contract of affreightment, upon the terms stated by the assistant-quartermaster. As charterers of the vessel under

such a contract, the United States were not liable to the claimant for its loss, and, of course, could not be to the insurance companies which were subrogated to his rights. *Macardier* v. *The Chesapeake Insurance Co.*, 8 Cranch, 39; *The Schooner Volunteer*, 1 Sumn. 551; *The Brig Spartan*, 1 Ware, 153; *Donohue* v. *Kittel*, 1 Cliff. 138. *Judgment affirmed.*

MR. JUSTICE MILLER dissented.

MR. JUSTICE STRONG did not take part in the decision.

SCHACKER *v.* HARTFORD FIRE INSURANCE COMPANY.

The doctrine in *Lee v. Watson*, 1 Wall. 337, that, "in an action upon a money-demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion must be considered in determining whether this court can take jurisdiction," affirmed and applied to the present case.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Submitted on printed arguments by *Mr. W. T. Burgess* for the plaintiff in error, and by *Mr. George O. Ide* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On opening this record, we find that the action below was assumpsit upon a policy of insurance for $1,400. There are two counts in the declaration, but they are both upon the same cause of action; and although the damages, both in the writ and declaration, are laid at $3,000, it is apparent from the whole record that there could not be a recovery in any event for more than $1,400 and interest from July 14, 1873.

Our jurisdiction, when this writ issued, was limited in cases of this character to those in which the "matter in dispute, exclusive of costs, exceeds the sum or value of $2,000." Rev. Stat., sect. 692. Now, in the same class of cases, where

a judgment or decree has been rendered since May 1, 1875, the amount must be $5,000. 18 Stat. 316.

In *Lee* v. *Watson*, 1 Wall. 337, we held, that "in an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion must be considered in determining whether this court can take jurisdiction." Applying this rule, which is clearly right, to the present case, it is ordered that the writ of error be

Dismissed for want of jurisdiction.

GARFIELDE v. UNITED STATES.

The Post-Office Department, by public notice, invited proposals for conveying the mails on route No. "43,132, from Portland, Oregon, by Port Townsend (W. T.) and San Juan, to Sitka, Alaska, fourteen hundred miles and back, once a month, in safe and suitable steamboats." The notice, after fixing the time of departure and arrival from the terminal ports, contained the following: "Proposals invited to begin at Port Townsend (W. T.), five hundred miles less. Present pay, $34,800 per annum." *Held*, 1. That, under sect. 248 of the act of June 8, 1872 (17 Stat. 313), this was a sufficient notice that proposals were desired for carrying the mails between Port Townsend and Sitka. 2. That the acceptance by the Post-Office Department of the proposal of a bidder to so carry them created a contract of the same force and effect as if a formal contract had been written out and signed by the parties.

APPEAL from the Court of Claims.

In addition to the facts set forth in the opinion of the court, the court below found that the appellant's proposal was as follows: —

"The undersigned, Selucius Garfielde, whose post-office address is Port Townsend, County of Jefferson, Territory of Washington, proposes to convey the mails of the United States from July 1, 1874, to June 30, 1878, on route No. 43,132, between Port Townsend, and Sitka, Alaska, under the advertisement of the Postmaster-General, dated Oct. 1, 1873, in safe and suitable steamboats, 'with celerity, certainty, and security' (law of June 8, 1872), for the annual sum of $26,000.

"This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars in reference to the route and service; and also after careful examination of the laws and instructions attached to advertisement of mail service.

"Dated, Port Townsend, W. T., Jan. 8, 1874.

"SELUCIUS GARFIELDE, *Bidder.*"

He made no proposal under the first part of the advertisement for carrying the mail between Portland, Oregon, by Port Townsend, W. T., and San Juan to Sitka, Alaska.

In March, 1874, the following notice of acceptance was sent to said Garfielde: —

"U. S. POST-OFFICE DEPARTMENT,

"OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,

"WASHINGTON, D. C., March 2, 1874.

"SIR, — The Postmaster-General has accepted your proposal, under advertisement of Oct. 1, 1873, for conveying the United States mail, from July 1, 1874, to June 30, 1878, on (Washington Territory) route No. 43,132, between Port Townsend and Sitka, Alaska, at $26,000 a year, 'with celerity, certainty, and security.'

"Contracts will be sent in due time to the postmaster at your place of residence, which you must execute and return to the department by the first day of June; otherwise you will be considered a failing bidder, and the service will be relet at your expense.

"You will request the postmaster at the beginning and end of the route to inform this office when you make the first trip.

"Respectfully, &c.,

J. L. ROUTT,

"*Second Assistant Postmaster-General.*

"MR. SELUCIUS GARFIELDE,

"PORT TOWNSEND, JEFFERSON CO., W. T.

"Recorded and sent March , 1874."

And on the eighteenth day of April, 1874, Garfielde was informed by telegram that his "proposal" was suspended; and on the 30th of May, 1874, a contract was entered into between the Post-Office Department and one Otis for carrying the mails from Portland by Port Townsend and San Juan, to Sitka and back, at $34,800 per annum.

The Court of Claims dismissed the petition, whereupon Garfielde appealed here.

Mr. Ebon C. Ingersoll and *Mr. B. F. Rice* for the appellant.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The Court of Claims holds that the proposal on the part of Garfielde, and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case.

That court held that the contract alleged by the petitioner was invalid, for the reason that the Postmaster-General exceeded his authority in making it without the previous publication required by the act of Congress of June 8, 1872. 17 Stat. 313, sect. 243.

That act required, "that, before making any contract for carrying the mail, . . . the Postmaster-General shall give public notice . . . such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service."

Among the instructions issued by the authority and official sanction of the Postmaster-General are the following, which were referred to and proved or admitted by the parties at the trial: —

"SPECIAL NOTICE. — All instructions and regulations promulgated by the Postmaster-General, conformably to law, for the guidance of persons employed by the department, are entitled to the same respect and obedience as acts of Congress. . . .

"SECT. 263. The Postmaster-General may order an increase or extension of service on a route, by allowing therefor a *pro rata* increase on the contract pay. He may change schedules of departures and arrivals in all cases, and particularly to make them conform to connections with railroads, without increase of pay, provided the running-time be not abridged. He may also order an increase of speed, allowing, within the restrictions of the law, a *pro rata* increase of pay for the additional stock or carriers, if any. The contractor may, however, in case of increase of speed, relin-

quish the contract, by giving prompt notice to the department that he prefers doing to carrying the order into effect. The Postmaster-General may also discontinue or curtail the service, in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause; he allowing, as a full indemnity to the contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the amount of service retained and continued."

"SECT. 267. Bidders should first propose for service strictly according to the advertisement, and then, if they desire, separately for different service; and, if the regular bid be the lowest offered for the advertised service, the other proposition may be considered."

"SECT. 275. The law provides that contracts for the transportation of the mail shall be awarded to the lowest bidder tendering sufficient guaranties for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security thereof."

The notice in the present case called for proposals for carrying the mails on route No. 43,132, from Portland, Oregon, to Sitka, Alaska. The distance was stated to be fourteen hundred miles. The duty was required to be performed each way once in each month, in safe and suitable steamboats, by the way of Port Townsend and San Juan. The time of departure and arrival at each terminus was specified, and ten days was allowed for the passage. It was then added, "Proposals invited to begin at Port Townsend (W. T.), five hundred miles less."

We are of the opinion that this was a sufficient notice, under sect. 243, *supra*, that proposals were desired for carrying the mail from Port Townsend to Sitka. The rigorous and strained construction which would defeat it, would defeat the reasonable intent of the statute. Each terminus was given, — to wit, Port Townsend and Sitka, — as was the route to be followed, — to wit, by way of San Juan, — and the length of time to be occupied, — to wit, ten days for the whole distance, of which this distance bore the proportion of nine to fourteen, — and the time of making up and delivery, upon the same principle. The steamer should leave Portland on the first day of every month; of the ten days allowed for the passage to Sitka, five-fourteenths would be

occupied in reaching Port Townsend, and nine-fourteenths would be allowed for the residue. The whole time and the whole number of miles being given, it was a simple arithmetical question of when the steamer would leave Port Townsend, and when, on its return, it would reach that port.

The object of the statute was to secure notice of the intended post-routes, of the service required, and the manner of its performance, that bidders might compete, that favoritism should be prevented, that efficiency and economy in the service should be obtained. It was not required that papers of this character should be drawn, as if they were subject to the criticism or dissection of a demurrer in a court of law.

Accordingly, it appears that this notice for the abridged distance is in conformity to the usages of the Post-Office Department for many years past, proof having been made of nine hundred similar advertisements published by the Postmaster-General. Long practice and constant usage favor the construction we have given to these proposals.

Great aid is also given by the two hundred and sixty-third regulation, above recited. It is there provided, that the Postmaster-General may, in his discretion, change the schedule of departures and arrivals, without increase of pay, if the running time be not abridged. Under this authority, he had the power to name the precise days of the month on which the steamer of Garfielde, the claimant, should leave Port Townsend or Sitka, or both of these places. The supposed defects in the advertisement are capable of a remedy, if needed, under this authority.

The damages are regulated by the same section. The claimant states, in his proposal, that he has full knowledge of the laws and regulations of the department on the subject of mail transportation. He no doubt knew that this regulation provided that the Postmaster-General could discontinue entirely the service for which he proposed, whenever in his judgment the public interests required it, and that for such discontinuance one month's pay was to be deemed a full indemnity to the contractor. There was reserved to the Postmaster-General the power to annul the contract when his judgment advised that it should be done, and the compensation to the contractor was specified. An indemnity agreed upon as the amount to be

paid for cancelling a contract, must, we think, afford the measure of damages for illegally refusing to award it.

Judgment reversed, and cause remitted, that a judgment may be rendered in favor of the appellant for a sum equal to one month's compensation under the proposal made by him and accepted by the Postmaster-General.

WHITESIDE ET AL. *v.* UNITED STATES.

1. An assistant special agent of the Treasury Department has no authority to bind the United States by contract, to repay the expenses of transporting, repairing, &c., abandoned or captured cotton.
2. The government is not bound by the act or declaration of its agent, unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for it.
3. Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity.

APPEAL from the Court of Claims.

This was a suit brought Dec. 21, 1871, against the United States, to recover $17,356, expended by claimants in hauling, baling, and ginning cotton in Arkansas, in 1865, under a contract with A. B. Miller, assistant special agent of the treasury, made at Camden, Ark., dated Nov. 10, 1865, by which they agreed to proceed to La Fayette County, procure evidence of the right of the United States to cotton there, put the same into shipping order, and transport it to Camden, for a half-interest in all cotton condemned. In all cases of a release after a seizure, upon sufficient evidence, they were to be repaid "all expenses of transportation, repairing," &c. In November and December, 1865, they delivered to Miller three lots of cotton, aggregating five hundred and twenty-two bales. Two of these lots, comprising four hundred and fifty-one bales, were, Jan. 9, 1866, taken from the warehouse at Camden, by General May, commanding the district, and turned over to one Harvey, the alleged owner of them. The claimants had hauled the cotton nearly eighty miles, rebaled it, &c., and ginned a part, for which they were never paid. Two undated vouchers, certified by Miller and approved by O. H. Burbridge, supervising special agent of the treasury, were given the claimants, showing the total

amount by them thus expended to be $17,356. Neither was presented to the Treasury Department for payment. On the 28th of March, 1866, Burbridge made the following indorsement on the contract: "Subject to the approval of the Secretary of the Treasury, the within contract is approved, so far as it conforms to the regulations of the Treasury Department for paying one-fourth of the cotton condemned, and it is recommended that one-half be allowed." The defendant pleaded the general denial and the Statute of Limitations. The Court of Claims, upon the facts found, ruled as matter of law, —

"1. That the contract relied on by the claimant, not being approved by the supervising special agent of the treasury, was incomplete, and, no benefit having resulted to the government from its alleged fulfilment, there is no legal or equitable ground for recovery.

"2. That, if the contract was valid, the loss to the claimants was caused by the illegal seizure of General May, and for that the government is not liable."

The petition of the claimants was dismissed, and they brought the case here.

Argued by *Mr. Joseph Casey* for the appellants, who cited *Salomon* v. *United States*, 19 Wall. 17; *United States* v. *Gill*, 20 id. 517; *Reeside* v. *United States*, 8 id. 38.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Discretionary authority was vested in the Secretary of the Treasury to appoint special agents to receive and collect abandoned or captured property in any State or Territory designated as in insurrection by the proclamation of the President issued for that purpose, subject to the condition that the power "shall not include property which has been used or intended to be used" to aid the rebellion. 12 Stat. 820.

Pursuant to that provision, the petitioners, as they allege, entered into a contract with an assistant special agent, that they should proceed to La Fayette County, in the State of Arkansas, and there procure evidence sufficient to establish the right of the United States to certain lots of cotton there situate, and put the same in shipping order, and transport the cotton to Camden, in that State, there to be delivered to the said assistant special

agent. In consideration whereof, it was then and there stipulated in behalf of the United States, as the petitioners allege, that they should have and be entitled to one-half interest in all such cotton so procured, when the same should be condemned; that, in all such cases where the cotton should be released by competent authority subsequent to the seizure, the stipulation was, that they should be paid for all expenses in procuring evidence to warrant the seizure, in putting the cotton in order for shipping, and in transporting the same to the place of delivery; and they aver that they proceeded to the place named, that they procured evidence to warrant the seizure of four hundred and fifty-one bales of cotton, and that they put the same in order for shipping, and transported the same to the place of delivery named in the contract.

Condemnation did not follow the seizure; but the petitioners aver that the cotton was subsequently released by competent authority, and delivered over to the former owners, and that they expended $17,356 in procuring evidence to warrant the seizure of the same, in putting it in order for shipping, and in transporting it to the place named in the contract.

Seasonable appearance was entered by the Attorney-General; and he filed an answer in due form, in which he denied each and every allegation of the petition, and alleged that the United States are not indebted to the petitioners in the sum claimed, or any part thereof. He also set up the following special defences: 1. That the petitioners have not always borne true faith and allegiance to the United States. 2. That they did not file their petition and transmit the same to the court within six years from the time the claim accrued.

Sufficient appears to show that the two lots of cotton mentioned in the petition, amounting to four hundred and fifty-one bales, were collected by the petitioners as abandoned or captured property; that expenses to the amount claimed were incurred by them in transporting, rebaling, and ginning the same, under the alleged contract, the terms of which correspond with those set forth in the petition; and that the same was subsequently released by the military officer commanding in that district before the cotton was condemned, as shown by the finding of the court.

Assistant special agents had no power to make such a contract, and the record fails to show that the contract under which the petitioners claim to have acted was ever approved by the supervising special agent. Express power to make such rules and regulations as were necessary to carry out the provisions of the act enacted for that purpose, was, by the eleventh section of the act of July 2, 1864, vested in the Secretary of the Treasury, with the approval of the President. 13 Stat. 378.

Regulations to effect the object were ordained by the secretary under the prior act, the twelfth article of which provided that "supervising special agents may contract in behalf of the United States, for the collection and delivery to them of such property in their respective agencies, on the best possible terms, not exceeding twenty-five per cent of the proceeds of the property," the condition being, that such "percentage must be in full compensation for all expenses, of whatever character, incurred in collecting, preparing, and delivering such property at the points designated." Prior to any such contract being made, the party proposing must submit in writing a statement of the kind and amount of property proposed to be collected, the locality whence to be obtained, and all the facts and circumstances connected with it.

Contracts of the kind were required to be in writing, and to be restricted to the collection of particular lots at named localities, except in special cases, where it might extend to the general collection and delivery of all abandoned property in limited districts, not greater than one parish or county. Supervising special agents could recommend an allowance greater than twenty-five per cent of the proceeds, but no greater allowance could be made until it was approved by the Secretary of the Treasury.

Art. 13 of the same regulations provided, "nor shall any liability be incurred or assumed, or *contract be made*, on the part of the United States, by such agents, except as authorized by these regulations." New regulations were issued on the 29th of July, 1864, by which those previously promulgated were superseded; and it was the regulations last named which were in force at the time the contract in this case was executed.

Such contracts for the collection and delivery of abandoned

or captured property might still be made by the supervising special agents, when the property was liable to be lost or destroyed in consequence of its location being unknown to the special agents, or from other causes. Parties under such circumstances might propose, for compensation, to collect and deliver it into the hands of such agents, at points designated by them; and the supervising special agents might contract in behalf of the United States for the collection and delivery to them of such property in their respective agencies, on the best possible terms, not exceeding *twenty-five per cent* of the proceeds of the property, the condition being, as in the prior regulations, that the percentage allowed must be in full compensation for all expenses, of whatever character, incurred in collecting, preparing, and delivering such property at the points designated.

Three other conditions are also annexed to the exercise of the power therein granted, as follows: 1. That the party proposing, prior to any such contract being made, must submit, in writing, a statement of the kind and amount of property proposed to be collected, the locality whence to be obtained, and all the facts and circumstances connected with it, particularly as to its ownership. 2. That any contract made in pursuance of the regulation must be in writing, and must be restricted to the collection and delivery of particular lots at named localities, except in special cases, where the contract may extend to the general collection and delivery of all abandoned property, in limited districts, as provided in the twelfth article of the prior regulations. 3. That the contractor, before payment to him under the contract, shall execute a bond with penalty, equal to the amount stipulated to be paid to him, and with sureties satisfactory to the supervising special agent, indemnifying the United States against all claims to the property delivered, on account of damages by trespass or otherwise, occasioned by the act or connivance of the contractor, or on account of expenses incurred in the collection, preparation, or transportation of the property.

Payment by the supervising special agent of any greater percentage than one-quarter of the proceeds is also forbidden by these regulations, even though he was of the opinion that

the case was one which would justify it. All he could do in such a case was to state the facts and circumstances, and refer the same to the secretary for instructions.

Nothing can be plainer in legal decision, than that the assistant special agent in this case derived no authority under the treasury regulations to make the contract set forth in the petition, and it is equally clear that the record furnishes no other evidence to justify the conclusion that the supervising special agent ever approved it, than what is contained in the indorsement thereon, which reads as follows: "Subject to the approval of the Secretary of the Treasury, the within contract is approved, so far as it conforms to the regulations of the Treasury Department, for paying one-fourth of the cotton condemned; and it is recommended that one-half of said cotton be allowed;" to which is appended the name of the supervising special agent.

Hearing was had; and the court dismissed the petition for the following reasons: 1. That the contract, not having been approved by the supervising special agent, was incomplete, and, no benefit having resulted to the government from its alleged fulfilment, there is no legal or equitable ground for recovery. 2. That if the contract was valid, the loss to the claimant was caused by the illegal seizure subsequently made, and for that the government is not liable.

Due application by the petitioners was made for an appeal, and the same was promptly allowed by the court.

Three errors are assigned by the appellants, as follows: 1. That the court erred in deciding that the United States are not bound by the contract given in evidence. 2. That the court erred in holding that the petitioners could not recover the expenses incurred by them in securing and transporting the cotton. 3. That the court erred in holding that the United States were discharged or relieved of liability by the subsequent illegal and arbitrary acts of their own military officer.

Much aid will be derived from dates in determining the question whether the contract given in evidence was made by competent authority, it being apparent that neither the act of Congress nor the treasury regulations vested any such power in the assistant special agents. Public employés, called super-

vising special agents, could make contracts for the collection of abandoned and captured property; and if it be conceded that they could also ratify such contracts as were made by assistant special agents, which is not admitted, it becomes highly important to examine with care the indorsement on the contract given in evidence in this case by the petitioners.

Enough has already appeared to show that the terms of the contract referred to were such that it would have been illegal, even if it had been executed by the supervising special agent, inasmuch as it promised one-half interest to the party employed to perform the service in collecting, preparing, and transporting the cotton to the place of storage.

Suppose supervising special agents could ratify contracts made by assistant special agents, it must nevertheless be understood that their power in that behalf was restricted to the ratification of such contracts as they themselves were empowered to make. Even suppose they could ratify a contract made by an assistant special agent allowing the party one quarter interest in the property collected and condemned, it would by no means follow that they could ratify a contract allowing to such party one-half interest in the property for performing the same service, as it is clear that the supervising special agents themselves were never authorized to make such a contract. They could contract to allow one quarter interest in the property, and no more. If a case arose which, in the opinion of the supervising special agent, would justify the payment of a larger percentage, he might make a statement of the facts and circumstances, and give his reasons for the opinion; but all he could do beyond that, was to refer the case to the secretary for instructions.

Coupled with that incurable difficulty are certain other obvious defects in the certificate, which clearly render it insufficient and inoperative as an instrument of ratification. Of these, the first is, that it was not signed by the supervising special agent until March 28, 1866, — more than four months and a half after the contract between the assistant special agent and the petitioners was executed.

Responsive to that, it is suggested that a subsequent ratification is as good as a previous authority; but the decisive answer

to that suggestion is, that all the services for which compensation is claimed were performed more than three months before the indorsement in question was made by the supervising special agent. His indorsement bears date as aforesaid, and the finding of the court shows that the services for which compensation is claimed were all performed before the close of the preceding year.

Properly construed, the indorsement is nothing more than a reference of the whole subject to the Secretary of the Treasury for his decision, and it is not pretended that the contract was ever in any respect or to any extent approved or ratified by the secretary. Even when regarded as a mere recommendation, it should be observed that the indorsement does not in any sense extend to the whole contract under which the services were performed. Instead of that, it is expressly restricted to such portions of it as conform to the regulations of the department for paying one-fourth of the cotton condemned. What is said about allowing one-half of the cotton, it is conceded, is *only* a recommendation; and it must be admitted that it does not comply with the conditions of the regulations, which require that the supervising special agent shall in such a case make a statement of the facts and circumstances, and give the reasons which in his opinion justify such additional allowance.

Viewed in any light, it is clear that the case of the petitioners falls within the prohibition contained in the thirteenth article of the regulations, which reads as follows: "Nor shall any liability be incurred or assumed or *contract be made* on the part of the United States by such agents, except as authorized by these regulations." Changes were subsequently made in the regulations, the sixth article of which forbids supervising agents to collect such cotton directly, or to make contracts for collecting it; but it is unnecessary to enter into those details, as the contract in this case was made during the period the prior regulations were in full force and operation.

Tested by these several considerations, it is obvious that the conclusion of the court below, that the contract was incomplete because not approved by the supervising special agent, is correct. Beyond all doubt, it was made by the assistant special agent, who had no authority to make it; and it appearing that it

never was approved by the supervising special agent, it follows that it was null and void.

Two minds are required to make a contract, or to change its terms and conditions after it is executed; and, if so, it is clear that the supervising special agent could not alter or vary the terms and conditions of the contract in this case without the consent of the petitioners, nor could any change be made in the contract, so as to bind the United States, unless it was in writing, as the twelfth article provides that any contract made in pursuance of the regulations must be in writing and be restricted to the collection of particular lots at named localities. Alterations not in writing, even if made by the consent of the parties, would be null and void, because the authority to make such without reducing the same to writing is not conferred by the regulations.

Apply that rule to the case, and it follows beyond all question that the supervising special agent never did approve the contract exhibited in the record. By the terms of the contract as exhibited, the petitioners were to have one-half interest in the cotton procured and condemned; but the indorsement which is invoked as an approval of it by the supervising special agent professes to reduce the allowance to one-fourth of the cotton condemned, and the record discloses no evidence whatever that the petitioners ever assented to any such alteration. On the contrary, the clear inference from the petition is, that they repudiate the suggested modification, as they therein allege that they are entitled to one-half interest in all such cotton so collected for and on behalf of the United States.

No attempt was made by the supervising special agent to approve the contract made by the assistant special agent, except so far as it conformed to the treasury regulations; and inasmuch as it did not conform to those regulations in respect to the compensation to be paid or allowed to the petitioners, it necessarily follows that the contract was made without authority, and that it is inoperative and void.

Argument to show that no benefit ever resulted to the United States from the alleged fulfilment of the contract is quite unnecessary, as the finding of the court below establishes the fact that the cotton was restored to the former owner, and

that it never was condemned. Services rendered under a contract executed by an unauthorized agent, and never approved or ratified by any competent authority, create no equity, unless it appears that the services performed resulted in some benefit to the party for whom they were rendered.

Admit that, and still it is insisted by the petitioners that they are entitled to the compensation claimed, because the cotton was restored to the former owner. They were to be allowed, by the terms of the contract, one-half of the cotton "so recovered and condemned;" but none was condemned, so that they cannot claim any thing under that stipulation, even if the contract is operative and binding.

Without assenting to that proposition, they next contend, that they are at least entitled to the expenses under the succeeding clause in the contract, which provides that "in all cases where the cotton is released after seizure, upon sufficient evidence to warrant the same, the petitioners will be repaid all expenses in performing the stipulated service."

Two facts must concur, even if the contract is operative, to entitle the petitioners to recover expenses: 1. That the cotton was released by the United States. 2. That the seizure was made upon sufficient evidence to warrant the same.

Neither is proved; and the first proposition is substantially negatived by the finding of the court below. Particular description is given of the several lots of cotton; and the finding of the court is to the effect that two of the lots of cotton, amounting to four hundred and fifty-one bales, were forcibly taken out of the warehouse where they were deposited by the military officer commanding in the district, and were restored to the former owner. Evidence to show that the officer acted in behalf of the United States is entirely wanting, and the case proceeded here throughout the trial upon the ground that the acts of the officer in restoring the cotton were unauthorized and unlawful, nor was any evidence introduced to show under what circumstances the cotton was seized, whether with or without sufficient evidence to justify the seizure within the meaning of the contract.

Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the

case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government. Story's Agency (6th ed.), sect. 307 *a*; *Lee* v. *Munroe*, 7 Cranch, 376.

Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. *Mayor* v. *Eschback*, 17 Md. 282.

Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. *State* v. *Hayes*, 52 Mo. 578; *Delafield* v. *State*, 26 Wend. 238; *People* v. *Bank*, 24 id. 431; *Mayor* v. *Reynolds*, 20 Md. 10.

Torts committed by an officer in the service of the United States do not render the government liable in an implied assumpsit, even though the acts done were apparently for the public benefit. *Gibbons* v. *United States*, 8 Wall. 274.

Neither fact nor circumstance is found in the record tending to show that the officer who took the cotton from the warehouse where it was stored, and returned it to the former owner, possessed any authority to interfere in the matter; and it is clear, that if the cotton was abandoned or captured property, within the meaning of the act of Congress under which it was collected, transported, and stored, the acts of the officer were unauthorized and unlawful. Proof to support his authority

not being found in the record, it cannot be presumed in this case, and consequently it does not appear that the cotton was released after seizure by the United States.

Suffice to say, that, in the opinion of the court, the case shows no legal or equitable ground of recovery.

Judgment affirmed.

BARKLEY v. LEVEE COMMISSIONERS ET AL.

1. A public corporation, charged with specific duties, such as building and repairing levees within a certain district, being superseded in its functions by a law dividing the district, and creating a new corporation for one portion, and placing the other under charge of the local authorities, ceases to exist except so far as its existence is expressly continued for special objects, such as settling up its indebtedness, and the like.
2. If, with such limited existence, no provision is made for the continuance or new election of the officers of such corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be *de facto* extinct.
3. In such case, if there be a judgment against the corporation, *mandamus* will not lie to enforce the assessment of taxes for its payment, there being no officers to whom the writ can be directed.
4. The court cannot, by *mandamus*, compel the new corporations to perform the duties of the extinct corporation in the levy of taxes for the payment of its debts, especially where their territorial jurisdiction is not the same, and the law has not authorized them to make such levy.
5. Nor can the court order the marshal to levy taxes in such a case; nor in any case, except where a specific law authorizes such a proceeding.
6. Under these circumstances, the judgment creditor is, in fact, without remedy, and can only apply to the legislature for relief.

ERROR to the Circuit Court of the United States for the District of Louisiana.

Argued by *Mr. E. T. Merrick* for the plaintiff in error, and by *Mr. C. L. Walker* for the defendants in error.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an application by Barkley to the court below for a *mandamus*, to be directed to the Board of Levee Commissioners of the parishes of Madison and Carroll, in the State of Louisiana, to compel such of said board as then survived to proceed to assess and collect a tax for the payment of a certain judgment alleged to have been recovered by the petitioner against the

said board on the nineteenth day of June, 1872; or, if the court should be of opinion that the survivors have not such power, and cannot fill vacancies in their body, then that the police juries of said parishes of Madison and Carroll should perform that duty, and assess and collect sufficient tax to pay said judgment; or, if the court should be of opinion that it had not power to make either of said orders, then that it should order the United States marshal of the district to assess at once, or by instalments, from year to year, and collect sufficient taxes upon the property subject to taxation for levee purposes in said parishes, to pay said judgment debt, interest, and costs; and for general relief.

The petition, amongst other things, states that the suit in which the judgment sought to be enforced was rendered, was originally commenced on the 23d of August, 1867, in the District Court of the Thirteenth District of Louisiana, against the Board of Levee Commissioners of the parishes of Carroll and Madison, for money due on levee warrants or scrip, being evidences of debt for work and labor done upon the levees in the said parishes, for the payment of which the laws of Louisiana had provided the assessment and collection of taxes, and liens and privileges upon all taxable property in said parishes; that this suit was afterwards removed by the plaintiff (who was a citizen of Tennessee) into the Circuit Court of the United States, and the police juries of said parishes were made parties thereto; that judgment was entered against the Board of Levee Commissioners on the date before mentioned for over $100,000; that the said board, after having acted under prior statutes, was created a corporation by act of the legislature March 10, 1859; that in March, 1861, each of said parishes was made a separate levee district, but the power to assess and collect taxes to meet their indebtedness was continued in the old board; that, when the suit was commenced, William Sutton, president of the board, Samuel P. Chambloss, commissioner for Carroll, and the three commissioners for Madison, were living, but that Sutton and Chambloss have since died, and no vacancies have been filled by election or otherwise. The petition further states, that a writ of *fieri facias* has been issued on the judgment and returned unsatisfied, after demand made on the secretary and treasurer

of the board, they, as well as the police juries of the parishes, pretending that the board was dissolved, and failing to point out any property belonging thereto. The petitioner further contends, that the two parishes are the really interested parties, and that, if the old Board of Levee Commissioners cannot act, it is the duty of the police juries to assess and collect sufficient taxes on the taxable property of the two parishes to pay the judgment.

A rule was taken on the surviving members of the Board of Levee Commissioners and on the police juries of the parishes of Madison and Carroll, to show cause why a *mandamus* should not issue as prayed.

The former, by exception and answer, set up various grounds of defence, the most important to note being that the corporation of levee commissioners was defunct by resignation and death, only three (who were not a quorum) remaining alive; also, that the judgment was void because no service of process had ever been made on the corporation.

The police juries answered that they were distinct corporations from that of the Board of Levee Commissioners, and were not vested with power to assess and collect the taxes in question.

After receiving evidence and hearing the parties, the court below refused the *mandamus*. Barkley sued out this writ of error.

We had occasion in the case of *The Police Jury* v. *Britton*, 15 Wall. 566, to explain the system of making and maintaining the levees in Louisiana, which formerly prevailed; which was, that the riparian proprietors were obliged to keep them up as one of the considerations on which they held their lands. This duty was executed under regulations made by the police juries of the several parishes (which are the administrative officers thereof), and under the direction of inspectors by them appointed. In some instances, by virtue of special statutes, the levees were managed by the parish itself, or by a district composed of several parishes, through proper officers appointed by the police juries, or otherwise, and the necessary expenses were raised by means of a tax levied upon the inhabitants. In 1852 the parishes of Carroll, Madison, and Catahoula (Catahoula, however, being soon after excluded) were constituted one levee district, which,

in the following year, was limited to the alluvial lands in those parishes (Laws of 1852, p. 234; Laws of 1853, p. 44); and a tax was directed to be levied for the support of the levees within the district, the amount and mode of assessing which was from time to time changed. This tax was directed to be collected annually by the sheriffs of the respective parishes, or by collectors to be appointed by the commissioners. To carry out the act, three commissioners were appointed from each parish, and were styled the "Board of Levee Commissioners," with power to fill vacancies in the board, appoint officers, lay out the district into wards, with one inspector to each ward, and order the levees to be repaired and built. In 1853 these commissioners were made elective, three to be elected biennially in each parish by the qualified voters thereof residing in the district or cultivating any portion of the alluvial lands therein. In 1859 the board were authorized to divide each parish into three equal portions, each of which was authorized to elect one commissioner.

The warrants on which the judgment in question was founded were issued in 1859 and 1860; and the legal provisions then in force with regard to assessing taxes for supporting the levees and paying the general liabilities of the board are to be found in the act of March 18, 1858, as amended by the act of March 12, 1859. Laws of 1858, p. 128; Laws of 1859, p. 30. By these acts it was provided that, for the purpose of making and repairing levees in the district, the commissioners should be authorized to assess annually a specific tax of ten cents on each and every acre of alluvial lands situated between the base of the hills west of Bayou Maçon and the levees on the Mississippi River, in the parish of Carroll, and between the levees and the western boundary, in the parish of Madison, including such alluvial lands only as had theretofore been held to be within said levee district; and the commissioners were further authorized to assess an annual *ad valorem* tax, at such a per cent on the State tax, including the mill tax, on *all* property assessed in said levee district (lands included), as might be necessary to build and repair the levees, or to meet and take up any or all outstanding liabilities of the said board, on account of levees theretofore erected or repaired. It would seem from

these enactments, that the specific tax of ten cents on each acre was intended for current expenses of levees, and that the *ad valorem* tax was intended to meet any deficiency and to pay prior obligations incurred. These taxes were declared to be a first lien and privilege upon the property subject thereto; and, on return by the sheriff or collector that it had been demanded and not paid, the district judge might grant an order of seizure and sale.

Thus stood matters in 1860. But by acts passed in March, 1861 (Laws of 1861, pp. 96, 110, 118), the levee district of the parishes of Madison and Carroll was abolished by the creation of two new separate districts composed of the said parishes respectively; and since that time no election of members of the old board has ever been held, the term of office of the then existing members having expired in 1862; and the board has been *functus officio*, and has for over fifteen years past ceased to have any duties to perform, or any existence whatever, except for the purpose of discharging its old indebtedness. By the death of the president, and the other members from Carroll, only three members survive, and these were all elected from the parish of Madison. In 1866, at the close of the war, an entirely new system, uniform throughout the State, was adopted, by putting all the levees under the charge of a single board, called the Board of Levee Commissioners (Laws of 1866, pp. 34, 36), and afterwards under the Board of Public Works of the State (Digest of Statutes of La., vol. ii., p. 398, tit. Public Works); and this board has been finally superseded by a private corporation, called the Louisiana Levee Company, which performs the work by contract with the State.

The question is, whether, as matters now stand, a *mandamus* can be issued to compel the surviving commissioners of the old board, or the police juries of the parishes of Madison and Carroll, to assess a tax on the property in the former levee district of said parishes, to pay the judgments in question; or, if not, whether the Circuit Court of the United States can direct the marshal to assess such tax.

In our judgment, neither of these things can be done.

In the first place, we think that the corporation of the Board of Levee Commissioners of the parishes of Madison and Carroll

is no longer in existence as a matter of fact. It is true, that the acts of 1861, abrogating the district, and creating two separate districts, one for each parish, did not in terms abolish the old corporation, but reserved to it the power to levy taxes in order to meet its outstanding indebtedness. But the creation of the new districts, providing (as was done) for the election of new and separate commissioners in the parish of Carroll, the placing of the levees in the parish of Madison under the charge of the police jury, and substituting an entire new system of levee management in the parishes, superseded all the functions of the old board and all provisions for their continuance by election, except so far as may have been saved by express reservation. Nothing, however, was thus saved, except their power to assess taxes to meet their outstanding indebtedness. And, in fact, no elections for members of the board have ever been held since that time. The term of office of the commissioners expired in November, 1862, and no provision was made in the laws constituting the board, that the members should hold over until the election of their successors. It is true, a general act had been passed in 1856, declaring that all State and parish officers should, after the expiration of their term of service, continue to perform the duties of their office until their successors should be inducted into office. But the members of this board were neither State nor parish officers, and the laws for electing others in their stead had ceased to have operation. And although, in ordinary cases, where an election has been omitted, officers may continue to act as officers *de facto* beyond their regular term (though not compellable to do so), and their acts will bind the corporation which they represent; yet, where, as in this case, no further provision is made for any further election, and the functions of the corporation have been abrogated or superseded, we do not think that any implied power to continue in office beyond the prescribed period exists. Our attention, however, is called to the act passed by the provisional legislature in 1867 (Laws 1867, pp. 264–272), by which the corporation is assumed to be in existence, and is authorized to make and issue certain bonds; and for that purpose it is declared (sect. 10), that "the Board of Levee Commissioners shall continue in office, with the power of filling vacancies in

said board, until their successors shall be duly elected and qualified according to law; and all powers granted to said Board of Levee Commissioners by any of the acts aforesaid, or by any other acts, shall and may be exercised by the members of the board now in office and any members appointed or elected as above described." This provision is evidently based upon a false suggestion. It supposes that "successors" could be "elected and qualified," when there was no law then in existence for any such purpose. A different system was in operation, and had taken the place of that which provided for the election of these commissioners. The act also declares that the Board of Levee Commissioners shall continue in office; taking for granted that they were in office, when, in fact, as we have seen, they were not. Furthermore, this act was one of the acts expressly excepted from the operation of the one hundred and forty-ninth article of the constitution of 1868, which validated all laws passed since the ordinance of secession in 1861. This express exception is undoubtedly equivalent to a repeal of the act.

Our conclusion from the whole case, therefore, is, that the corporation in question no longer exists, and that no *mandamus* can be issued to it or to the surviving persons who were formerly members of the board.

The prayer for a *mandamus* against the police juries of the parishes of Madison and Carroll clearly cannot be granted. Those bodies never had any power to assess the levee tax in question. There is no law authorizing them to do so. They do not act in concert, which they would have to do, in order to assess a uniform tax on the whole district; and there is no privity of duty, interest, or succession between them and the extinct board.

The remaining prayer, for an order directing the marshal to assess the tax, is equally inadmissible. It is true, that, in the case of *The Supervisors of Lee County* v. *Rogers*, 7 Wall. 175, we held that the Circuit Court acting in that case, after having issued a *mandamus* to the supervisors of the county, commanding them to levy a tax, and they having refused to obey the writ, was authorized, under the Code of Iowa, which provided for such a proceeding, to issue a writ to the marshal commanding

him to levy and collect the taxes required. But we have never gone beyond this case, which depended on the special law referred to. The marshal is the executive officer of the court, and can only execute its process; and the court, without some such special authority as that contained in the Iowa Code, cannot enforce its judgments for the recovery of a debt in any other way than by seizing and selling the property of the judgment debtor, or (where imprisonment for debt is authorized) by seizing and detaining his person. Where the debtor is a corporation, it cannot seize the property of its members. This it would do if it should issue a writ to the marshal commanding him to levy a tax upon the inhabitants of a municipal corporation, or upon their private property. The court has no more authority, in point of law, to seize the property of citizens for the debt of the corporation in which they reside (except in some of the Eastern States, where a different system prevails) than it has to seize the property of another corporation. Its power to issue a *mandamus* to compel municipal officers to perform their duty of levying a tax is a distinct power, which extends to all ministerial acts which officers are legally bound and refuse to perform. In the recent case of *Rees* v. *The City of Watertown*, 19 Wall. 107, we decided that the court has no general power to commission the marshal to levy taxes for the purpose of satisfying a judgment, and we refer to that case for a more full explanation of our views on this subject.

Much reliance is placed by the counsel of the petitioner on the fact that the taxes directed to be imposed by the acts of 1858 and 1859 were made a first lien and privilege upon the property liable thereto. We do not see how this can affect the present application. Liens for taxes are very generally created throughout the country; but it is never supposed that the public creditors, to whom the money raised by tax is to be paid, have the benefit of such lien. It is created for the benefit of the public authorities, to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property taxed.

The truth is, that a party situated like the present petitioner is forced to rely on the public faith of the legislature to supply him a proper remedy. The ordinary means of legal redress

have failed by the lapse of time and the operation of unavoidable contingencies. It is to be presumed that the legislature will do what is equitable and just; and in this case legislative action seems to be absolutely requisite.

Judgment affirmed.

BROUGHTON v. PENSACOLA.

A change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, embracing substantially the same corporators and the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities, although different powers are possessed under the amended or new charter, and different officers administer its affairs.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

Argued by *Mr. P. Phillips* and *Mr. Thomas G. Jones* for the appellant.

Submitted on printed arguments by *Mr. C. C. Yonge* for the appellee.

MR. JUSTICE FIELD delivered the opinion of the court.

By an act passed on the 2d of March, 1839, by the then Territory, now State, of Florida, the city of Pensacola, at the time a pre-existing corporation, was rechartered, and its powers were vested in a mayor and board of aldermen, who were, at all times, to continue "to act in their respective functions" until the election and qualification of their successors in office. Among the powers conferred by the charter was the power to borrow money, not exceeding $5,000 a year, and to levy taxes and provide for their collection, with a limitation of the amount to be levied upon real estate to three-fourths of one per cent.

In December, 1850, by an amendatory act, these limitations were repealed, and a larger loan and a greater rate of taxation upon real estate were allowed. By a further amendatory act, passed on the 3d of January, 1853, the mayor and aldermen, with the consent of a majority of the corporation, were author-

ized to subscribe, in the name of the city, any amount of money which they might deem necessary to any railroad leading from the city; and, for the purpose of procuring the amount of the subscription, were empowered to borrow the same, and impose a tax upon real estate within its limits, not exceeding two per cent on the assessed value of the property. By another act, passed in the same month, the Alabama and Florida Railroad Company was chartered to construct a railroad from some point on Pensacola Bay (the city being the point afterwards selected) northward to the boundary line of Florida and Alabama, and there to connect with another line of road to be constructed from the city of Montgomery, Ala.

Under the act of Jan. 3, 1853, the city of Pensacola subscribed $250,000 to the capital stock of this railroad company, and in payment of the same executed and delivered to the company five hundred bonds of $500 each, payable twenty years after date, with interest at the rate of seven per cent per annum, payable semi-annually on the first days of January and July, at such bank in the city of New York as the treasurer might direct, on the surrender of the coupons for such interest attached to the bonds.

The plaintiff is the holder of sixteen hundred and ninety of these coupons, now past due, and alleges that the city has never made any provision for their payment at any bank in the city of New York, or at any other place; that, until about the 1st of January, 1871, the city received the coupons in payment of taxes, although the taxes assessed were never sufficient to absorb the coupons as they matured, but that since that time the city has refused, and still refuses, to recognize its obligation to pay them. Several judgments have been recovered by other parties upon coupons of the same kind against the city; but executions issued thereon have been returned wholly unsatisfied, because the city possessed no property out of which they could be made.

The constitution of Florida, adopted in 1868, provided that the legislature should "establish a uniform system of county, township, and municipal government." In pursuance of this requirement, the legislature, in 1868 and 1869, passed acts "to provide for the incorporation of cities and towns, and to estab-

lish a uniform system of municipal government" in the State. These acts authorized the establishment of a municipal government, with corporate powers and privileges by the voluntary action of the male inhabitants of any hamlet, village, or town in the State, not less than one hundred in number; and also provided for the reorganization of existing municipal corporations under their provisions. Under these acts the charter of the city was surrendered, and attempts were made to reorganize its government; but these attempts failed, because the reorganization was not made within the periods prescribed. In consequence of such failure, and because the acts provided for the cessation of corporate authority in case the reorganization was not effected within the periods designated, the citizens residing within the limits of the city proceeded to establish a municipal government with corporate authority, under the act of 1869, as citizens not having any existing corporation were authorized to do. Such establishment or reorganization of government having been effected, the plaintiff applied to its officers for the payment of the coupons held by him; but the payment was refused, they insisting that they were officers of a new and distinct corporation from the one which issued the bonds and coupons mentioned, and that the present corporation was not responsible for them. The plaintiff thereupon filed the present bill, asking for a decree for the amount of the coupons held by him against the city of Pensacola, and that the city be compelled to levy a tax upon real and personal property within its limits sufficient to satisfy such decree and costs, and for general relief. Upon demurrer, the bill was dismissed; and, on appeal, the case is brought here for our consideration.

The ancient doctrine, that, upon the repeal of a private corporation, its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications, that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court of equity, so far as to

subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund pledged to the payment of the debts of creditors and stockholders; and, if a municipal corporation, upon the surrender, or extinction in other ways, of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation. In this case, it is averred in the bill that the city of Pensacola, upon the surrender of its original charter, did not possess any property.

It is not necessary, however, in the view we take of the proceedings for the reorganization of the city government, to consider the effect of an absolute repeal of the charter of a municipal corporation upon its obligations. It is sufficient that here, in our judgment, there was a continuation of the corporation of Pensacola, with its original rights of property and obligations, not a new and distinct creation of corporate capacity and liability.

The constitution of 1868 only designed to secure uniformity in county, township, and municipal government. It contemplated no change in existing liabilities. The acts of 1868 and 1869, passed to carry into effect the constitutional provision, aimed solely to secure this uniformity. They do not even allude to previous liabilities. Although a municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the State for the convenient administration of government, yet, when authorized to take stock in a railroad company, and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the Constitution, which preserves against the interference of a State the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of or escape from liabilities,

the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. That such was the intention of the State of Florida in the present case, we have no doubt; to suppose otherwise would be to impute to her an insensibility to the claims of morality and justice, which nothing in her history warrants.

The principle which applies to the State would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the State, whatever changes may take place in its constitution of government. "The new government," says Wheaton, "succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former government. It becomes entitled to the public domain and other property of the State, and is bound to pay its debts previously contracted." Inter. Law, 30. So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities.

In a case recently decided by the Circuit Court of the United States for the Northern District of Florida, *Milner's Administrator* v. *City of Pensacola*, 2 Woods, 632, the effect of the legislation of the State upon the corporate existence of the city of Pensacola was examined. The court held and sustained its conclusion in an able and well-considered opinion, that the reorganization of the city, under the act of 1869, was simply the assumption by the city of the new powers and privileges

which the act conferred, and was not the creation of a new corporation, — a conclusion which accords with our judgment.

It follows, from the views we have expressed, that the remedy of the plaintiff was not by a suit in equity, but by an action at law against the present corporation upon the coupons; and, if judgment be recovered thereon and be not paid, then by *mandamus* upon its officers to compel them to raise the requisite funds for its payment in the manner prescribed by its charter.

Decree affirmed, without prejudice to the plaintiff's right to proceed at law.

NOTE. — *Jones* v. *Pensacola*, appeal from the Circuit Court of the United States for the Northern District of Florida, was argued at the same time and by the same counsel as the preceding case.

MR. JUSTICE FIELD delivered the opinion of the court.

This case is similar in all essential particulars to that of *Broughton* v. *Pensacola*; and, upon the authority of the decision therein rendered, the decree is affirmed, without prejudice to the plaintiff's right to proceed at law.

DALTON v. JENNINGS.

Letters-patent No. 124,340, issued to John Dalton, March 5, 1872, for "an alleged new and useful improvement in ladies' hair-nets," are void, because his specification and claim precisely and accurately describe various fabrics which had been made and were in public use for a long time previous to his application.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This was a bill filed for an account, and for an injunction restraining the defendant from infringing Dalton's letters patent. Upon the final hearing of the cause the court below dismissed the bill, and Dalton appealed here.

Mr. J. Vansantvoord for the appellant.

Mr. Arthur v. *Briesen* for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

On the fifth day of March, 1872, there was issued to the

complainant below, and appellant here, John Dalton, a patent, No. 124,340, for a new and useful improvement in ladies' hair-nets, in which he claims as new "a head or hair net composed of a main set of meshes fabricated of coarse thread, combined with an auxiliary set or sets of meshes fabricated of fine thread, substantially as described." In his specification, he says that the nets in use before his invention were composed of coarse threads so far apart that the meshes or interstices were too large and permitted the hair to protrude through them, and that his invention consists in combining with these coarse threads and larger spaces a finer thread crossing these spaces as often as is necessary to confine the hair, which thread, from its fineness, is mainly invisible. He gives directions for the use of this finer thread in making the meshes, in which there is nothing he claims to be new. His claim is not for the process of making the net, but for the new product made in the manner prescribed.

The defendant relies on want of novelty, produces some fifteen or sixteen specimens of fabrics and designs which he alleges to be anticipations of plaintiff's production, and refers to as many persons who were making or selling fabrics which are identical with that patented by plaintiff.

If the netting patented by appellant had been produced by him for the first time, it would be difficult to find in it or in the process by which it is made any thing deserving the name of invention within the meaning of the patent law. If the spaces between the threads of the netting were too large, thereby permitting the escape of the hair, there is nothing new in the idea that making them smaller would remedy the evil. If the size of the threads then in use was too large for beauty, neither discovery nor invention were necessary to reduce it. There is nothing new in the number of these threads, in their size, nor in the manner in which they are crossed and connected. Where, then, is the invention? Is it in the fact that some of the threads are coarser and some of finer size? This can hardly be invention, since gauze and netting have been made with threads or cords of unequal size time out of mind, and with varying and equal or unequal spaces between them.

Turning from this view of the subject, the evidence and the exhibits produced by defendant show a number of fabrics long in use, in which the meshes are made by larger cords or threads crossing each other at various angles, with smaller threads filling up the space and making the interstices smaller.

Defendant's exhibit No. 16 is a piece of lace with spaces separated and bounded by a larger thread or cord, which are subdivided into much smaller spaces by a smaller thread, that is proved to be fifteen years old, and may have been fifty.

Exhibit No. 12 is a tidy with very large cords, like floss, with spaces between each, and across these spaces diagonally are four threads dividing that space into four smaller ones. It is proved that from this Dalton tried to get a workman to get up a pattern for his hair-nets.

Exhibit No. 11 is a mosquito bar, long in use, with large cords crossing each other about an inch or more apart, and smaller threads crossing this space each way, so as to make the interstices too small for the mosquito to get through, just as Dalton's net prevents the hair from escaping. It is the same device to remedy the same defect: only one is for mosquitoes and the other for hair.

Exhibit No. 6 is a hair-net consisting of larger cords crossing each other at equal distances, with finer threads passing over or around them, and filling up the space so as to reduce the size of the interstices. This was used and sold openly in New York in 1871.

Exhibit No. 2 is a hair-net made twenty years ago, in which the larger cords are knotted together at their crossing at regular intervals, and smaller threads between, so as to make the meshes smaller. We can see in this case no difference between this and exhibit of plaintiff, unless it be in the shape of the spaces large and small, and the manner in which the threads are connected. Neither of these is claimed by appellant as any part of his invention or as new, for he says this is a matter well known to lace-makers.

In the lace, in the mosquito bar, in the tidy, the fabric presents in each case the precise arrangement described in the plaintiff's patent. These have been long in use, and are well known.

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Decree affirmed.

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4. The doctrine, that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.

ERROR to the Corporation Court of the city of Alexandria, Va.

Ejectment for a tract of land situate in the city of Alexandria, Va. Finding and judgment for the plaintiff. The defendant sued out this writ of error. The facts are stated in the opinion of the court.

Argued by *Mr. S. F. Beach*, for the plaintiff in error, and by *Mr. Philip Phillips* and *Mr. John Howard*, *contra.*

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action of ejectment to recover certain real

property in the city of Alexandria, in the State of Virginia. It was brought in the corporation court of that city, and a writ of error from the court of appeals of the State to review the judgment obtained having been refused, the case was brought here directly by a writ of error from this court. Authority for this mode of procedure will be found stated in the case of *Gregory* v. *McVeigh*, reported in the 23d of Wallace.

The plaintiff in the corporation court proved title in himself to the premises in controversy, and consequent right to their immediate possession, unless his life-estate in them had been divested by a sale under a decree of condemnation rendered in March, 1864, by the District Court of the United States for the Eastern District of Virginia, upon proceedings for their confiscation. The defendant relied upon the deed to his grantor executed by the marshal of the district upon such sale.

The proceedings mentioned were instituted under the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

In July, 1863, the premises in controversy were seized by the marshal of the district, by order of the district-attorney, acting under instructions from the Attorney-General. In August following, a libel of information against the property was filed in the name of the United States, setting forth that the plaintiff in this case was the owner of the property in question; that he had, since the passage of the above act, held an office of honor and trust under the government of the so-called Confederate States, and in various ways had given aid and comfort to the rebellion; that the property had been seized in pursuance of the act in compliance with instructions from the Attorney-General, and, by reason of the premises, was forfeited to the United States, and should be condemned. It closed with a prayer that process of monition might issue against the owner or owners of the property and all persons interested or claiming an interest therein, warning them at some early day "to appear and answer" the libel; and, as the owner of the property was a non-resident and absent, that an order of publication in the usual form be also made. Upon this libel the district judge ordered process of monition to issue as prayed, and designated

a day and place for the trial of the cause, and that notice of the same, with the substance of the libel, should be given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of monition and notice were accordingly issued and published. Both described the land and mentioned its seizure, and named the day and place fixed for the trial. The monition stated that at the trial all persons interested in the land, or claiming an interest, might "appear and make their allegations in that behalf." The notice warned all persons to appear at the trial, "to show cause why condemnation should not be decreed, and to intervene for their interest."

The owner of the property, in response to the monition and notice, appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently, on the 10th of March, 1864, the district-attorney moved that the claim and answer and the appearance of the respondent by counsel be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines, and a rebel." On the same day the motion was granted, and the claim and answer ordered to be stricken from the files. The appearance of the respondent was by his answer. The court immediately entered its sentence and decree, condemning the property as forfeited to the United States, reciting that, the usual proclamation having been made, the default of all persons had been duly entered. The decree ordered the issue of a *venditioni exponas* for the sale of the property, returnable on the sixteenth day of the following April. At the sale under this writ the grantor of the defendant became the purchaser.

The question for determination is, whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded.

There were several libels of information filed against the property of the plaintiff at the same time with the one here mentioned. They were identical in their allegations, except as to the property seized, and the same motion to strike from the files the appearance, claim, and answer of the respondent was made in each case, and on the same day, and similar orders were entered and like decrees of condemnation. One of these was brought here, and is reported in the 11th of Wallace. In delivering the unanimous opinion of this court, upon reversing the decree in the case, and referring to the order striking out the claim and answer, Mr. Justice Swayne said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." 11 Wall. 267.

The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to

deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether.

The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physi-

cal seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.

These views find corroboration in the opinion of Mr. Justice Story, in the case of *Bradstreet* v. *Neptune Insurance Co.*, 3 Sumn. 601. In that case, the action was upon a policy of insurance upon a vessel, the declaration alleging its loss by seizure of the Mexican government. The defendants admitted the seizure, but averred that it was made and that the vessel was condemned for violation of the revenue laws of Mexico, and to prove the averment produced a transcript of the record of the proceedings of the Mexican court against the vessel, and of the decree of condemnation. Among the questions considered by the court was the effect of that record as proof of the laws of Mexico, and of the jurisdiction of the court and the cause of seizure and condemnation. After stating that the sentence of a foreign court of admiralty and prize *in rem* was in general conclusive, not only in respect to the parties in interest, but

also for collateral purposes and in collateral suits, as to the direct matter of title and property in judgment, and as to the facts on which the tribunal professed to proceed, Mr. Justice Story said, that it did not strike him that any sound distinction could be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*; that in each the sentence was conclusive as to the title and property, and, it seemed to him, was equally conclusive as to the facts on which the sentence professed to be founded. But the learned judge added, that it was an essential ingredient in every case, when such effect was sought to be given to the sentence, that there should have been proper judicial proceedings upon which to found the decree; that is, that there should have been some certain written allegations of the offence, or statement of the charge for which the seizure was made, and upon which the forfeiture was sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, might know what the offence was with which they were charged, and might have an opportunity to defend themselves, and to disprove the same. "It is a rule," said the learned judge, "founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or for its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party, — *castigatque, auditque.* It may be binding upon the subjects of that particular nation. But, upon the

eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding."

In another part of the same opinion the judge characterized such sentences "as mere mockeries, and as in no just sense judicial proceedings;" and declared that they "ought to be deemed, both *ex directo in rem* and collaterally, to be mere arbitrary edicts or substantial frauds."

This language, it is true, is used with respect to proceedings *in rem* of a foreign court, but it is equally applicable and pertinent to proceedings *in rem* of a domestic court, when they are taken without any monition or public notice to the parties. In *Woodruff* v. *Taylor*, 20 Vt. 65, the subject of proceedings *in rem* in our courts is elaborately considered by the Supreme Court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed, that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment *in personam*. "A proceeding," continued the court, "professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

In the proceedings before the District Court in the confiscation case, monition and notice, as already stated, were issued and published; but the appearance of the owner, for which they called, having been refused, the subsequent sentence of

confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. His position with reference to subsequent proceedings was then not unlike that of a party in a personal action, after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld.

The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. *Norton* v. *Meador*, Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Jus-

tice Miller, to the same purport, in the case of *Ex parte Lange*, 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest*, 9 id. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction." Id. 350.

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornell* v. *Williams*, reported in the 20th of Wallace, is more accurate. "The jurisdiction," says the justice, "having attached in the case, every thing done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." 20 Wall. 250.

It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction

is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction. *Judgment affirmed.*

MR. JUSTICE MILLER, MR. JUSTICE BRADLEY, and MR. JUSTICE HUNT dissented.

NOTE. — *Gregory* v. *McVeigh*, also in error to the Corporation Court of the city of Alexandria, Va., was argued at the same time and by the same counsel as was the preceding case.

MR. JUSTICE FIELD delivered the opinion of the court.

This case is similar to that of *Windsor* v. *McVeigh*, and, upon the authority of the decision in that case, the judgment below is affirmed.

MR. JUSTICE MILLER, MR. JUSTICE BRADLEY, and MR. JUSTICE HUNT, dissented.

BIGELOW *v.* BERKSHIRE LIFE INSURANCE COMPANY.

In an action against it upon a policy of life insurance, which provided that it should be null and void if the insured died by suicide, "sane or insane," the company pleaded that he "died from the effects of a pistol-wound inflicted upon his person by his own hand, and that he intended, by inflicting such wound, to destroy his own life." *Held*, that a replication setting up that, "at the time when he inflicted said wound, he was of unsound mind, and wholly unconscious of his act," is bad.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action on two policies issued by the defendant on the life of Henry W. Bigelow. Each contained a condition in avoidance, if the insured should die by suicide, *sane or insane;* and in such case the company agreed to pay to the party in interest the surrender value of the policy at the time of the death of Bigelow. The defendant pleaded that Bigelow died from the effects of a pistol-wound inflicted upon his person by his own hand, and that he intended by this means to destroy his life. To this the plaintiffs replied, that Bigelow, at the

time when he inflicted the pistol-wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. A demurrer to this replication was sustained by the court below, and the plaintiffs bring the case here for review.

Argued by *Mr. Thomas Hoyne* for the plaintiff in error.

An act of self-destruction has never been held to avoid a policy of life insurance, when the insane person has been so unsound of mind as to be unconscious of the act he was committing. *Borradaile* v. *Hunter*, 5 Mann. & Gr. 639; *Hartman* v. *Keystone Ins. Co.*, 21 Penn. 466; *Dean* v. *Mutual Life Ins. Co.*, 4 Allen, 96; *Cooper* v. *Mass. Life Ins. Co.*, 102 Mass. 227; *Eastbrook* v. *Union Ins. Co.*, 54 Me. 224; *Breasted* v. *Farmers' Loan and Trust Co.*, 4 Hill, 73; 4 Seld. 299; 2 Bigelow, Life Ins. Cas. 4; Bliss, Life Ins., sect. 243, p. 415; *Pierce* v. *Travellers' Ins. Co.*, 3 Ins. Law J. 422; *Van Zandt* v. *Mutual Benefit Life Ins. Co.*, 55 N. Y. 177.

In all cases, sane or insane, the law allows the plaintiff to show that death was not intended by the deceased; but that it was an involuntary act, or a result of mental disease. *Borradaile* v. *Hunter*, *supra*; *Hopps' Case*, 31 Ill. 392.

The decided cases all establish that only persons capable of discriminating the particular act are to be held in law accountable. *Van Zandt* v. *Mutual Benefit Life Ins. Co.*, *supra*; Bliss, Life Ins., *supra*; *Pierce* v. *Travellers' Ins. Co.*, *supra*; *Breasted* v. *Farmers' Loan and Trust Co.*, *supra*; *Life Ins. Co.* v. *Terry*, 15 Wall. 580, and cases there cited.

A suicide, "sane or insane," is a connection of words without meaning, if taken apart from their literal signification, or out of the context. Their real meaning as they stand connected with the other words of the proviso is, that, if the insured *be sane or insane* at the time he intentionally commits suicide, *i.e.*, self-murder, the policy is to be void and of no effect.

Even if it be conceded that a death self-inflicted, whether a *suicide* or not, is within the terms of the policy, yet the *fact* that the death was not *intentional*, by reason of the insured's *mental unconsciousness of his act*, would clearly render the company liable.

Mr. H. G. Miller, contra.

MR. JUSTICE DAVIS delivered the opinion of the court.

There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured "shall commit suicide," or "shall die by his own hand." But since the decision in *Life Ins. Co.* v. *Terry*, 15 Wall. 580, the question is no longer an open one in this court. In that case the words avoiding the policy were, "shall die by his own hand;" and we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract; as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, "shall die by suicide (sane or insane)," must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. "Shall die by his own hand, sane or insane," is, doubtless, a more accurate mode of expression; but it does not more clearly declare the intention of the parties. Besides, the authorities uniformly treat the terms "suicide" and "dying by one's own hand," in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. Chief Justice Tindall, in *Borradaile* v. *Hunter*, 5 Mann. & Gr. 668, says, "The expression, 'dying by his own hand,' is, in fact, no more than the translation into *English* of the word of *Latin* origin, 'suicide.'" Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words, "shall commit suicide," standing alone in a policy, import self-murder, so do the words, "shall die by his own hand."

Either mode of expression, when accompanied by qualifying words, must receive the same construction. This being so, there is no difficulty in defining the sense in which the language of this condition should be received. Felonious suicide was not alone in the contemplation of the parties. If it had been, there was no necessity of adding any thing to the general words, which had been construed by many courts of high authority as not denoting self-destruction by an insane man. Such a man could not commit felony; but, conscious of the physical nature, although not of the criminality, of the act, he could take his own life, with a settled purpose to do so. As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words, "sane or insane," were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act; and this condition, based, as it is, on the construction of this language, informed the holder of the policy, that, if he purposely destroyed his own life, the company would be relieved from liability. It is unnecessary to discuss the various phases of insanity, in order to determine whether a state of circumstances might not possibly arise which would defeat the condition. It will be time to decide that question when such a case is presented. For the purposes of this suit, it is enough to say, that the policy was rendered void, if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing.

Insurance companies have only recently inserted in the provisos to their policies words of limitation corresponding to

those used in this case. There has been, therefore, but little occasion for courts to pass upon them. But the direct question presented here was before the Supreme Court of Wisconsin in 1874, in *Pierce* v. *The Travellers' Life Insurance Company*, 34 Wis. 389, and received the same solution we have given it. More words were there used than are contained in this proviso; but the effect is the same as if they had been omitted. To say that the company will not be liable if the insured shall die by "suicide, felonious or otherwise," is the same as declaring its non-liability, if he shall die by "suicide, sane or insane." They are equivalent phrases. Neither the reasoning nor the opinion of that court is at all affected by the introduction of words which are not common to both policies.

It remains to be seen whether the court below erred in sustaining the demurrer. The replication concedes, in effect, all that is alleged in the plea; but avers that the insured at the time "was of unsound mind, and wholly unconscious of the act." These words are identical with those in the replication to the plea in *Breasted* v. *Farmers' Loan and Trust Company*, 4 Hill, 73; and Judge Nelson treated them as an averment that the assured was insane when he destroyed his life. They can be construed in no other way. If the insured had perished by the accidental discharge of the pistol, the replication would have traversed the plea. Instead of this, it confesses that he intentionally took his own life; and it attempts to avoid the bar by setting up a state of insanity. The phrase, "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the mere act itself. Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences.

In the view we take of the case, enough has been said to show that the court did not err in holding that the replication was bad. *Judgment affirmed.*

SAWIN, ADMINISTRATOR, v. KENNY.

Under the Code of Practice of Arkansas, in force when this judgment was rendered, and therefore furnishing a rule of practice for the courts of the United States in that State, an action on a contract, upon which two or more persons were jointly bound, might be brought against all or any of them; and, although they were all summoned, judgment might be rendered against any of them severally, where the plaintiff would have been entitled to a judgment against such defendants if the action had been against them alone.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

Kenny and Foley, the plaintiffs below, sued Sawin and the Little Rock, Pine Bluff, and New Orleans Railroad Company, upon a contract which on its face appeared to have been executed by and to bind only Sawin, of the one part, and Kenny and Foley, of the other. A copy of the contract was attached to and made part of the complaint; which alleged that, although executed in the name of Sawin, it was, in fact, the contract of the railroad company, and that Sawin, by signing it, became liable jointly with the company for the performance of its obligations. The averment was then made, that the "railroad company, by virtue of said contract, and the said Daniel C. Sawin, by signing the same and making himself party thereto, . . . were indebted to said plaintiffs for work and labor done, and materials furnished, under said written contract, in the principal sum of $8,816.08;" for which, with interest, a judgment was asked.

The defendants answered separately; the railroad company denying the execution of the contract and all liability under it. Sawin also denied the execution of the contract by the railroad company, and claimed that he alone was bound by it. He then set out his defence to the claim as made against him, and, among other things, said, "It is not true that the said railroad company and this defendant, or either of them, were . . . indebted to the said plaintiffs in the sum of $8,816.08, for materials furnished, or work done, by said plaintiffs; and this defendant avers, that the entire sum due from this defendant to said plaintiffs, at the time of the commencement of this suit for said materials furnished and work done under said contract,

was the sum of $2,500, for which this defendant hereby offers to let judgment go against him."

A trial was then had to a jury upon the issues joined, which resulted in a verdict in favor of the railroad company, but against Sawin, for $9,131.98. After the verdict, Sawin moved an arrest of judgment against himself; assigning for cause: —

1. That the said plaintiffs did not by their said complaint state facts sufficient to constitute a cause of action; and —

2. That said plaintiffs have not by their said complaint stated or shown any right or cause of action against the defendant.

This motion was overruled, and judgment entered on the verdict. The case coming here upon writ of error, the only error assigned is the refusal of the court to arrest the judgment.

Submitted, on printed arguments, by *Mr. Quinton Corwine* for the plaintiff in error, and by *Mr. A. H. Garland* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We think the court below decided correctly. By the Code of Practice of Arkansas, which was in force when this judgment was rendered, it was provided, that, "Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option" (sect. 4480, Gantt's Dig., 1874); that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants" (sect. 4701); and that, "though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone" (sect. 4704). This, under the act of June 1, 1872 (17 Stat. 187, sect. 5; Rev. Stat. 914), furnished a rule of practice for the courts of the United States in that State. Clearly, in this case, if the action had been brought against Sawin alone, judgment could have been entered against him on this verdict. He, in his answer, acknowledged his liability upon the contract, which is the foundation of the action, and offered to confess judgment

for $2,500. After that, as between him and the plaintiffs, the only question was one of amount. Substantial justice has, therefore, been done between these parties; and, by the operation of these remedial provisions of the code, the sacrifice of substance to mere form and mode of proceeding has been prevented.

Judgment affirmed.

INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY v. HORST.

1. When instructions are asked in the aggregate, and there is any thing exceptionable in either of them, the court may properly reject the whole.
2. It is the settled law in this court, that, if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to give further instructions.
3. In an action against a railroad company for injuries received by a passenger upon its road, it is not error for the court to instruct the jury, "that a person taking a cattle-train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes."
4. The rule of law, that the standard of duty on the part of a carrier of passengers should be according to the consequences that may ensue from carelessness, applies as well to freight-trains as to passenger-trains. It is founded deep in public policy; and is approved by experience, and sanctioned by the plainest principles of reason and justice.
5. A plaintiff is bound to state his case, but not the evidence by which he intends to prove it.
6. Where the evidence on the part of the plaintiff did not tend to establish contributory negligence on his part, and the court charged that the burden of proving it rested on the defendant, and that it must be established by a preponderance of evidence, — *Held*, that the charge was not erroneous.
7. The construction given in *Nudd et al.* v. *Burrows, Assignee*, 91 U. S. 426, to the act of June 1, 1872 (17 Stat. 197), reaffirmed.
8. A motion for a new trial is not a mere matter of proceeding or practice in the district and circuit courts. It is, therefore, not within the act of June 1, 1872, and cannot be affected by any State law upon the subject.

ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action by the defendant in error against the Indianapolis and St. Louis Railroad Company for injuries received while travelling on a cattle-train, and resulted in a verdict against the company for $8,000; whereupon it brought the case here. The facts are stated, and the assignment of errors referred to, in the opinion of the court.

Argued by *Mr. W. A. Brown* and *Mr. John T. Dye* for the plaintiff in error.

1. It was error for the court to instruct the jury that a person taking a cattle-train is entitled to the highest possible degree of care and diligence, regardless of the kind of train he takes. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Unger* v. *Forty-second St., &c. R. R. Co.*, 51 N. Y. 502; *Hegeman* v. *Western R. R. Corporation*, 13 id. 9; *Lebanon* v. *East Boston Ferry Co.*, 11 Allen, 515; *Ford* v. *London & South-western Railway Co.*, 2 Fost. & Find. 830; *Warren* v. *Fitchburg R. R. Co.*, 8 Allen, 230; *Simmons* v. *New Bedford, Vineyard, & Nantucket Company*, 97 Mass. 368; *Galena & Chicago Union Railway Co.* v. *Fay*, 26 Ill. 568; *Fuller* v. *Talbott*, 23 id. 357; *Pitt., Cin. & St. L. R. R. Co.* v. *Thompson*, 56 id. 168; *Dunn* v. *Grand Trunk Railway Co.*, 58 Me. 187; *Chicago, B. & Q. R. R. Co* v. *Hazzard*, 26 Ill. 376.

2. The court erred in refusing to instruct the jury that their investigation as to the negligence of defendant should be confined to the charges alleged in the declaration.

The defendant had a right to a trial, according to law, of the issues joined. The question of its liability for damages should not have been left to depend upon the general conclusion of a jury, that it had not exercised the highest possible degree of care in his transportation, unrestrained by the pleadings.

3. The court erred in permitting the plaintiff to prove the manner of changing cabooses at Mattoon, after the injury, to show the "wrongfulness of their (defendants') conduct" at the time of the accident. *Gahagan, Adm'r*, v. *Boston & Lowell R. R. Co.*, 1 Allen, 189.

4. The evidence did not show any negligence of the defendant in the particulars mentioned in the complaint.

On the contrary, plaintiff's evidence showed that the accident resulted from his own negligence. The defendant was therefore entitled to a verdict. *Todd* v. *Old Colony & Fall River R. R. Co.*, 3 Allen, 21; *Jeffersonville R. R. Co.* v. *Hendricks*, 26 Ind. 231; *Bridges* v. *North London Railway Co.*, 6 Law Rep. Q. B. 384; *Smer* v. *G. W. Railway Co.*, 4 Law Rep. Ex. 117; *Adams* v. *L. & Y. Railway Co.*, 4 Law Rep. C. P. 742; *Penn. R. R. Co.* v. *Aspell*, 23 Penn. St. 149.

5. Although plaintiff's evidence showed that the accident resulted from plaintiff's negligence, the court charged that "the burden of proving contributory negligence rests on defendant; and it will not avail the defendant, unless it has been established by a preponderance of the evidence." This was error. *Chicago, B. & Q. R. R. Co.* v. *Hazzard, supra; Butterfield* v. *Forester*, 11 East, 60; *Button* v. *Hudson River R. R. Co.*, 18 N. Y. 253; *Mayo* v. *Boston & Maine R. R. Co.*, 104 Mass. 140; *Johnson* v. *Hudson River R. R.*, 20 N. Y. 60.

6. It was error for the court to refuse the motion of defendant to instruct the jury to find specially upon particular questions of fact involved in the issues, in the event they should find a general verdict. *Osborn* v. *United States Bank*, 8 Wheat. 366; *Butler* v. *Young*, Chicago Legal News, vol. v. p. 146; *Republican Ins. Co.* v. *Williams*, id. p. 97; *Sage* v. *Brown*, 24 Ind. 469; *Barnes* v. *Williams*, 11 Wheat. 415; *Prentice* v. *Zane's Adm'r*, 8 How. 487; *Livingston Mar. Ins. Co.*, 6 Cranch, 280; *Peterson* v. *United States*, 2 Wash. C. C. 36; *Butler* v. *Hooper*, 1 id. 499; *Bellows* v. *Directors, &c. of Hallowell and Augusta Bank*, 2 Mason, 31.

Mr. A. G. Porter for the defendant in error.

The passenger was entitled to the highest degree of care and diligence. *Philadelphia & Reading R. R. Co.* v. *Derby*, 14 How. 486; *Steamboat New World* v. *King*, 16 How. 469.

The burden of proving contributory negligence rested on the defendant. *Railroad Company* v. *Gladman*, 15 Wall. 401; Whart. on Neg., sect. 423.

The refusal of the court to submit the interrogatories of the defendant below to the jury was correct. *Nudd et al.* v. *Burrows, Assignee*, 91 U. S. 426.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The defendant in error was injured while travelling on the road of the plaintiff in error, and brought this suit to recover damages. To set in their proper light the propositions of law relied upon by the plaintiff in error for the reversal of the judgment, a brief statement of the facts of the case is necessary.

The plaintiff was a farmer, residing in Pennsylvania. He had been engaged in the cattle trade since 1862, and had

shipped annually, over the Western railroads to the Eastern markets, about a thousand head of cattle. The cause of action occurred on the 4th of August, 1870. He had shipped on the defendant's road, the day before, five car-loads of cattle, to be conveyed to Pittsburg, and was on the train at the time of the injury. He arrived at Mattoon, in Illinois, about midnight. He and two other drovers were asleep in a caboose attached to the hinder end of the train. They were aroused by the conductor, who commanded them to get out of the caboose, and to get on top of the train. He said he should detach the caboose; and that, at some distance further up the road, he would attach another. The train was then at rest. The plaintiff went forward with his prod to look after his cattle, and returned on the roof of the cars to where his fellow-drovers were standing awaiting the movement of the train. He stood there, with his carpet-sack in one hand and the prod in the other. He used the latter to support himself. The train ran a half or three quarters of a mile to pass on to a switch, and take on the other caboose. A brakeman on the hindmost car had a lantern in his hand. The light so dazzled or blinded the plaintiff, that he thought he was on the same car with the brakeman, though he was in fact near the end of the car next before it. The train, in backing on the switch, stopped before it reached the caboose which was to be attached to it. It was thereupon suddenly drawn forward, "to take up the slack," and then suddenly backed, producing a quick and powerful concussion, which precipitated the plaintiff between the car on which he was standing and the hindmost car. "The shock of the concussion," one of the witnesses says, "was about as hard a shock as I ever felt, not to knock a train off the track. It seemed as if it was tearing every thing to pieces." The plaintiff fell on the coupling, and received the injury complained of. No warning was given that these sudden and violent movements were likely to occur, and none was given that any precautions were necessary. No light was furnished to the plaintiff and his fellow-passengers, and no directions were given for their guidance and safety. All the evidence in the case is set out at length in the bill of exceptions. It was given by the plaintiff. The defendant gave none. The entire charge of the court, and

the instructions asked for on both sides, are also fully set out. The defendant asked for twenty instructions. The court refused to give any of them. The plaintiff asked for six, which were all given. To both the refusal and the giving the defendant excepted. The plaintiff's prayers were excepted to, severally.

When instructions are asked in the aggregate, as were those of the defendant, and there is any thing exceptionable in either of them, the whole may be properly rejected by the court. *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 id. 338; *Johnson* v. *Jones*, 1 Black, 209.

There were several things of this character in those in question. It is sufficient to refer to one of them. The court was asked to charge that the defendant was bound to exercise only ordinary care and diligence. This point will be considered, presently, in another connection.

It is the settled law in this court, that, if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial. The court has then done all that it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask any thing more. *Labor* v. *Cooper*, 7 Wall. 565. We think the charge in this case fulfils the requisites we have defined. The errors of omission and commission alleged are not numerous. We might, perhaps, properly content ourselves in this connection with vindicating the charge as given. We shall, however, consider all the several assignments of error which we deem material, both with respect to the charge and otherwise, as we find them set forth in the printed brief of the counsel for the company. The same points were fully and ably argued by the same gentlemen orally at the bar.

"1. The court erred in instructing the jury that a person taking a cattle-train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes."

Such is the rule of care and diligence laid down by this court in three adjudications where the action was against a carrier of persons. The first was the *Philadelphia & Reading R. R.*

Co. v. *Derby*, 14 How. 486. The plaintiff was travelling gratuitously on a passenger train. It was said: "Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence." "Any negligence in such case may well deserve the epithet of *gross*." The next was *The Steamboat New World* v. *King*, 16 How. 469. That was the case of a free passenger carried on a steamer, and injured by the explosion of a boiler. Referring to the rule laid down in the prior case, the court said: "We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law." The last case was the *New York Central R. R. Co.* v. *Lock*, 17 Wall. 357. That was a case, like this, of a passenger accompanying his cattle on a freight-train. It was there said: "The highest degree of carefulness and diligence is expressly exacted." This is conclusive as authority upon the subject. But, upon principle, why should not the law be so in this case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace-car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger-trains. The same considerations apply to freight-trains: the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would

drive the carrier from his business. It does not, for instance, require, with respect to either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and hence safer than those of wood; nor upon freight-trains air-brakes, bell-pulls, and a brakesman upon every car; but it does emphatically require every thing necessary to the security of the passenger upon either, and reasonably consistent with the business of the carrier, and the means of conveyance employed. The language used cannot mislead. It well expresses the rigorous requirement of the law, and ought not to be departed from. The rule is beneficial to both parties. It tends to give protection to the traveller, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. *Dunn* v. *Grand Trunk R. R. Co.*, 58 Me. 157; *Tuller* v. *Talbot*, 23 Ill. 357; *Pittsburg & C. R. R. Co.* v. *Thompson*, 56 Ill. 138.

"2. The court erred in refusing to instruct the jury, that their investigation as to the negligence of the defendant should be confined to the charges alleged in the declaration."

The charge in both counts of the declaration was "carelessness and negligence and improper conduct" of the defendant's servants in connection with the injury. The plaintiff was bound to state his case; but he was not bound to state the evidence by which he intended to prove it. We have looked through the proofs as set out in the bill of exceptions; and have found nothing in this connection that did not support, with more or less cogency, the plaintiff's averment.

"3. The court erred in permitting the plaintiff to prove the manner of changing cabooses at Mattoon, after the injury, to show the wrongfulness of defendant's conduct at the time of the accident."

Detaching the caboose in the night, and requiring the plaintiff to ride so far upon top of the freight-cars before reaching the caboose that was to be attached, involved a serious peril, and was the cause of the casualty complained of. The evidence was competent, as tending to prove, if such proof were necessary, that the change could as well have been made where the second caboose was, and that making it when and where it

was made was a matter of choice and in no wise of necessity. The point is covered by the *Toledo, &c. R. R. Co.* v. *Owen*, 43 Ind. 405. We think the decision there was correct.

"4. Although the plaintiff's evidence showed that the accident resulted from the plaintiff's negligence, the court charged that 'the burden of proving contributory negligence rests on the defendant; and it will not avail the defendant, unless it has been established by a preponderance of evidence.'"

We have said, that riding on the top of a freight-car in the night involved peril. When commanded to go there, the plaintiff had no choice but to obey, or to leave his cattle to go forward without any one to accompany and take care of them. The command was wrong. To give him no warning was an aggravation of the wrong. He, however, rode safely to the switch, standing in one place. He had a right to assume that the posture and place would continue to be safe. He had no foreknowledge of the coming shock. The conductor knew it, but gave him no word of caution or notice. He was unaware of danger until the catastrophe was upon him. The behavior of the conductor was inexcusable. If there was fault on the part of the plaintiff, in what did it consist? We find nothing in the record which affords any warrant for such an imputation. As the case went to the jury, the opposite was established. There was no proof to the contrary. Nevertheless, the court, out of abundant caution, charged the jury upon the hypothesis that there might be some testimony tending possibly to support the adverse view. The instruction contained two elements: —

(1.) That the burden of proof rested on the defendant.

This was correct. *Railroad Company* v. *Gladden*, 15 Wall. 401.

(2.) That "it," meaning contributory negligence, could "not avail the defendant, unless established by a preponderance of evidence."

This, also, was correct. The court did not say that if such negligence were established by the plaintiff's evidence, the defendant could have no benefit from it, nor that the fact could only be made effectual by a preponderance of evidence, coming exclusively from the party on whom rested the burden of

proof. It is not improbable that the charge was so given by the court from an apprehension that the jury might without it be misled to believe that it was incumbent on the plaintiff to show affirmatively the absence of such negligence on his part, and that if there was no proof, or insufficient proof, on the subject, there was a fatal defect in his case. It was, therefore, eminently proper to say upon whom the burden of proof rested; and this was done without in any wise neutralizing the effect of the testimony the plaintiff had given, if there were any, bearing on the point adversely to him. We think the instruction was properly expressed. If there was any ambiguity unfavorable to the defendant, it was the duty of his counsel to bring it to the attention of the court, and ask its correction. *Lock* v. *United States*, 2 Cliff. 574. This was not done, perhaps because it was deemed unnecessary. If the defendant had, in the first instance, required any charge upon the subject, it should have been refused. It is not the duty of the court to instruct where the instruction demanded assumes a theory of fact which is unsupported or contradicted by the evidence. On the contrary, it is error to do so; and the jury should be distinctly told that the requisite evidence is wanting. Such instructions cannot aid the jury, and may confuse and mislead them. *Michigan Bank* v. *Eldred*, 9 Wall. 544; *Ward* v. *United States*, 14 id. 28.

"5. The court refused the motion of the defendant to instruct the jury to find specially upon particular questions of fact involved in the issues, in the event they should find a general verdict."

These questions of fact were submitted by the counsel for the defendant. Upon looking into them, we find they were nine in number. All of them related to the question of negligence on the part of the plaintiff. It is insisted that they were within the act of Congress of June 1, 1872 (17 Stat. 197, sect. 5), and that hence the court below erred in declining to require the jury to find in answer to them, in addition to the general verdict. We had occasion to consider this statute in *Nudd* v. *Burrows*, 91 U. S. 441, and see no reason to depart from the views there expressed. We said the section in question had its origin in the code enactments of many of the

States, and was intended to relieve the legal profession from the burden of studying and of practising under the two distinct and different systems of the law of procedure in the same locality, one obtaining in the courts of the United States, the other in the courts of the State; but that it was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed. Whether Congress could do the latter was left open to doubt. It was not then, and it is not now, necessary to decide that question. The statute expressly recognizes the distinction between proceedings in equity, in admiralty, and at common law. The separate character of the two former is recognized by the Constitution, and it protects them. The latter Congress can change and regulate as it may see fit, within the limits of its constitutional authority. Here, the question is one of legislative intent. The intention of the law-maker constitutes the law: a thing may be within the letter of a statute, and not within its meaning; and within its meaning, though not within its terms. 9 Bouv. Bac. Ab. title Stat., sect. 5, pp. 246, 247; *Burgett* v. *Burgett*, 1 Ohio, 221; *Stater* v. *Cave*, 3 Ohio St. 85; *United States* v. *Babbit*, 1 Black, 61.

Where a State law, in force when the act was passed, has abolished the different forms of action, and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law is undoubtedly obligatory upon the courts of the United States in that locality. There may be other things, not necessary now to be specified, with respect to which it is also binding. But where it prescribes the manner in which the judge shall discharge his duty in charging the jury, or the papers which he shall permit to go to them in their retirement, as in *Nudd* v. *Burrows*, or that he shall require the jury to answer special interrogatories in addition to their general verdict, as in this case, we hold that such provisions are not within the intent and meaning of the act of Congress, and have no application to the courts of the United States. These are all matters relating merely to the mode of submitting the case to the jury. The conformity is required

to be "as near as may be" — not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.

While the act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory. The constitution of Indiana, art. 7, sect. 5, requires that "the Supreme Court shall, upon the decision of every case, give a statement of each question arising in the record of such case, and the decision of the court thereon." This was held to be directory, and not mandatory. *Willets* v. *Ridgeway*, 9 Ind. 367.

The Criminal Code of Practice of Arkansas provided that the court should admonish the jury that it was their duty not to allow any one to speak to them upon any subject connected with the trial, nor to converse among themselves upon any such subject, until the cause was finally submitted to them. It was held this provision was only directory and cautionary, and that the omission to comply with it was not error, and did not affect the validity of the verdict. *Thompson* v. *The State*, 26 Ark. 326. See also *Wood* v. *Terry*, 4 Lans. 86; *State* v. *Carney*, 20 Iowa, 82; *Bowers* v. *Sonoma*, 32 Cal. 66; *Hill* v. *Boyland*, 40 Miss. 618.

We think the learned judge below decided correctly in refusing to submit the interrogatories to the jury.

"6. The motion for a new trial should have been granted in the court below."

In the courts of the United States, such motions are addressed to their discretion. The decision, whatever it may be, cannot be reviewed here. This is a rule of law established by this court, and not a mere matter of proceeding or practice in the Circuit and District Courts. *Henderson* v. *Moore*, 5 Cranch, 11; *Boswell* v. *De la Lanza*, 20 How. 29; *Schuchardt* v. *Allen*, 1 Wall. 371. It is, therefore, not within the act of Congress of June 1, 1872, and cannot be affected by any State law upon the subject. *Judgment affirmed.*

MARTIN *v.* HAZARD POWDER COMPANY.

The doctrine announced in *Jerome* v. *McCarter*, 21 Wall. 17, affirmed, and applied to this case.

ON motion for a rule upon the plaintiff in error to file a new *supersedeas* bond.

Mr. S. F. Phillips for the defendant in error, — in support of the motion.

Mr. H. C. Alleman for the plaintiff in error, in opposition.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

We held in *Jerome* v. *McCarter*, 21 Wall. 17, after much consideration, that if, "after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond, have changed, so that security which, at the time it was taken, was good and sufficient, does not continue to be so, we might, upon a proper application, so adjudge and order as justice might require. But upon facts existing at the time the security was accepted, the action of the justice, within the statute and the rules of practice adopted for his guidance, is final."

The showing made in this case does not satisfy us that the alleged insufficiency of the security taken when the writ of error was sued out, arises from any change in the circumstances of the sureties since the acceptance and approval of the bond.

Motion denied.

THE "ATLAS."

1. Owners of a ship are not liable, under existing laws, for any loss, damage, or injury by a collision, occasioned without their privity or knowledge, beyond the amount of their interest in such ship and her cargo at the time the collision occurred.
2. The true measure of compensation to an innocent party, in a case of collision, is damages to the full amount of loss actually suffered by him.
3. The shipper or consignee of the cargo of a vessel, being innocent of all wrong, bears no proportion of the loss resulting from a collision. He may pursue his remedy at common law; or in admiralty, by a proceeding *in rem*, or

by libel *in personam* against the owner of either or both of the offending vessels.

4. A collision between two vessels, which were at fault, resulted in the loss of the cargo of a third vessel which was not at fault. Its owner proceeded *in rem* against one of the offending vessels. *Held*, that he was entitled to a decree against it for the entire amount of his damages.

CROSS-APPEALS from the Circuit Court of the United States for the Eastern District of New York.

This is a libel against the steamboat "Atlas," by the Phœnix Insurance Company, for damages resulting from a collision between the "Atlas" and the steam-tug "Kate," whereby a canal-boat, in tow of the latter, was sunk, and her cargo, of which the company was the insurer, was lost and destroyed.

The District Court found that the collision was caused by the mutual fault of the "Atlas" and "Kate," and decreed that the libellant recover against the "Atlas" one-half of the damages sustained.

Both parties appealed; and, the Circuit Court having affirmed the decree, they appealed here, and filed a written stipulation as follows: —

"1. The appeal taken by the claimants to this court from the decree of the United States Circuit Court for the Southern District of New York is waived, so as to bring up before the court, on the argument of this cause on the cross-appeals, only the question of law as to whether libellants are entitled to recover the whole amount of the damages, instead of one-half.

"2. The parties agree that the collision mentioned in the libel and proceedings in this cause occurred by the mutual fault of the steamboats 'Atlas' and 'Kate.'

"3. The libellants waive and abandon the assignment of error, and the claim that the decree of the Circuit Court should be reversed, on the ground that the 'Atlas' only was in fault; and rely only on the assignment of error, that the decree should have been for the whole amount of the damages sustained by them, instead of for only a moiety thereof; and the only question to be submitted to the court is the question of law, whether the 'Atlas' is liable for the whole amount of libellants' damages."

Mr. W. R. Beebe for the claimants.

The libellant having failed to make the "Kate" a party,

cannot hold the "Atlas" responsible for more than one-half of the damages.

The libellant, however, stands in no better position than the "Kate" herself. It is a *rem* liability, and not a personal claim or right.

Had it been decided that the canal-boat which held the cargo was in fault, and contributed to the collision, then the decisions are numerous both in the admiralty courts of England and in this country as to the limit of the liability of the "Atlas."

The reason is obvious; the owners of the cargo choose their boat, and repose confidence in the officers and crew that the enterprise will be properly conducted. This is especially true when the latter must rely upon other motive power for locomotion.

This reliance upon other motive power falls as much within the scope of the employment of the canal-boat, by the owner of the cargo, as would her navigation by sails, if she had them, or steam, if that was her propelling power. To hold otherwise would seem to involve the question within the character of his employment, and the necessities of his vessel, of the master of the canal-boat to employ motive power.

This employment would make the motive power as much the agent of the shipper as the canal-boat and its crew would be.

It is hard to see where the distinction exists, if there is any.

If these positions are correct, then, clearly, the cargo holds no better position to the collision than does the "Kate." *Hay* v. *La Neve*, 2 Shaw's Appeal Cases, 395; *The Bonita*, *The Alfred*, *The Jose Maria*, all cited in *The Milan*, 1 Lush. 388; *The Hasbrouck*, 5 Ben. 244.

The power and jurisdiction of the admiralty are peculiar, and a court of common law does not possess them.

At common law, contributory negligence defeats the right of recovery. In admiralty it only calls upon the court to apportion the damages between the faulty vessels.

This necessity involves the power to declare what vessels are in fault, where the fault lies, and to apportion the damages.

This duty is just as incumbent upon the court when there is contributory negligence as it is to decide the case at all.

It follows, as an equal necessity, that whether all the vessels are before the court or not, the power and duty of the court are equally imperative to declare where the fault lies, and apportion the damages.

From these positions it follows that each vessel, whether before the court or not, is equally bound to bear its share or portion of damages. The libellant cannot shield himself from the consequences of making the "Atlas" the sole party, by claiming that any vessel before the court may, under certain circumstances, be liable for more than that share or portion.

The power of apportionment is peculiar. It is *sui generis* in the admiralty courts, and has no recognition in the courts of common law. We submit that its fair intent and the principles involved in it make a several and not joint liability; were not this so, the whole doctrine must necessarily fall to the ground.

The power to apportion necessarily involves that of determining the extent of the liability of each. The court is not bound to apportion equally. It has the power to determine not only who are in fault, but the extent of such fault, and the amount which each must contribute.

The acts of Congress have limited the liability of the owner to the value of his vessel. When the court has fixed the extent of his contributory guilt, it would be a harsh rule, that, because his vessel happens to be of greater value than that of his co-trespasser, he must also pay for the wrongs of the latter. This would virtually abolish the law of apportionment, and bring into full force the common-law doctrine.

The establishment of the law, that the court can only deal with the vessel actually seized, and hold it solely liable for the whole damages, upon the idea of all being joint trespassers, would leave the victim entirely in the hands of the libellant; and, if there were really ten offending vessels, it might perhaps be that one least in fault is chosen because it happens to be the most valuable, or is proceeded against from even more selfish motives.

This would defeat the whole object and purpose of the law of apportionment.

Mr. William Allen Butler for the libellants.

The court below erred in limiting the recovery of libellants to one-half the value of the cargo destroyed by the collision. Under the circumstances, they were entitled to recover their entire loss from either of the two vessels which were adjudged to be mutually in fault in causing it.

The owners of the cargo of the canal-boat in tow of the "Kate" were innocent parties, and in no way responsible for the collision. They had no control over the movements of either of the steam-tugs, nor were the master and crew of either of those vessels their agents or servants. The cargo stood in the same relation to the two steam-tugs, by whose concurring negligence it was destroyed, as that of a passenger lawfully on the canal-boat or on either of the steam-tugs at the time of the disaster, who, without fault of his own, sustained personal injuries by the collision. *The Milan*, 1 Lush. 388; *The Alabama and The Game-cock*, 92 U. S. 695.

Upon the facts of this case, the owners of the cargo could at common law have proceeded against the owners of either offending vessel, and recovered the whole amount of their damages. An innocent party, injured by the co-operative negligence of several persons, can sue them jointly or severally, and recover from either compensation for the injury done by all. *Guille* v. *Swan*, 19 Johns. 381; *Chapman* v. *New Haven R. R. Co.*, 19 N. Y. 341; *Webster* v. *Hudson River R. R. Co.*, 38 id. 260; *Arctic Ins. Co.* v. *Austin*, 10 N. Y. Sup. Ct. (2 Hun) 195; *Colegrove* v. *N. Y. & N. H. R. R. Co., & Harlem R. R. Co.*, 20 N. Y. 292.

The same rule prevails in admiralty. *The New Philadelphia*, 1 Black, 62.

The common law creates a joint and several liability, not because the injury is the result of a joint act implying a common design or intent to produce the injury, but because by a single and forcible act, which would not have happened except by the concurring negligence of two parties, an injury has been done to an innocent party.

That rule must also obtain in the courts of admiralty. This is matter of right, in respect to which the rule of admiralty apportioning damages equally between the parties mutually at fault does not apply. That rule is one of limitation and

distribution of damage among and between wrong-doers, as respects themselves. It is one, and hardly one, of equity, because it imposes an equal contribution on the ships in fault, without regard to their relative value or to the degree of blame imputable to either. It is properly styled by Chancellor Kent, following Cleirac, a *rusticum judicium*, by which an arbitrary rule is applied as the best method of disposing of cases in which the precise measure of fault is either inscrutable or not ascertainable with accuracy. 3 Kent's Com., p. 313 (11th ed.). See *Hay* v. *Le Neve*, 2 Shaw's Scotch Appeals, 395.

It certainly has no proper application to the case of an innocent sufferer. Justice requires that his wrong shall be redressed without reference to an adjustment of the relative degrees of blame or responsibility of the wrong-doers as between themselves, or to their ultimate liability to each other for contribution.

The Milan, 1 Lush. 388, — the only reported case in which it has been attempted to impose the admiralty rule of equal apportionment, as between wrong-doers, upon an innocent party, by limiting his recovery in a suit against one of two offending vessels to a moiety of the damage done by both, — has been disapproved by this court. *The Alabama and The Game-cock, supra; The D. S. Gregory*, 9 Wall. 513.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Owners of ships and vessels are not liable, under existing laws, for any loss, damage, or injury by collision, if occasioned without their privity or knowledge, beyond the amount of their interest in such ship or vessel and her freight pending at the time the collision occurred.

Subject to that provision in the act of Congress, the damages which the owner of the injured vessel is entitled to recover are estimated in the same manner as in suits for injuries to other personal property, and the claim for compensation may, in certain cases, extend to the loss of freight, necessary expenses in making repairs, and unavoidable detention.

Restitutio in integrum is the leading maxim in such cases; and where repairs are practicable, the rule followed by the admiralty courts in such a case is, that the damages assessed

against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the injury was inflicted. *The Clyde*, Swabey, 24; *The Gazelle*, 2 W. Rob. 280; *The Baltimore*, 8 Wall. 385; Williams & Bruce, Prac. 77; 1 Pars. on Ship. 538; *The Pactolus*, Swabey, 174.

Sufficient appears in the record to show that the libellants became the insurers of the cargo of the canal-boat named in the libel, consisting of linseed, in the sum of $14,500, for a voyage from the port of New York to the port of New Brunswick, in the State of New Jersey; that the canal-boat, with her cargo on board, was taken in tow at the port of departure by the steam-tug called the "Kate;" that the steam-tug, with her tow, including the canal-boat and two other vessels, proceeded in safety to New Brighton, where the whole flotilla remained until the next morning, when they started for the port of destination, the steam-tug heading north-west by north, and taking her course across the kills directly for Port Johnson, on the Jersey shore; that the steam-tug with the canal-boat and the two other vessels in tow kept that course until she was within one hundred and fifty yards of the shore, when the master, being then in the pilot-house, heard the whistle of a steamboat about one-tenth of a mile distant; that it was a single blast, being the signal that the respective boats as they approached should pass to port; that the master of the steam-tug having the canal-boat in tow answered the signal by blowing his whistle twice, which is the proper signal that the boats should pass to starboard, it being unsafe for him, owing to the state of the tide and the conformation of the adjacent shore, to attempt to pass the approaching vessel on the port side; that the signal given was the proper one; and the charge is, that the master of the steam-tug immediately starboarded his helm, and that the approaching vessel, which proved to be the steam-tug the "Atlas," within a minute ran into the steam-tug having the canal-boat in tow, with great force and violence, staving her in from her plank-shear to the third plank below her water line, which caused the steam-tug and canal-boat she had in tow to sink, whereby the cargo of the canal-boat became a total loss; and the libellants also charge, that the loss was wholly occasioned through the fault, negligence, and want of skill of

those in charge of the approaching steam-tug. *The Friends*, 4 Moore, P. C. C. 319.

Process was served, and the claimants appeared and filed an answer, setting up the several defences alleged in the record. Testimony was taken on both sides, and, the parties having been fully heard, the District Court entered an interlocutory decree that the damages claimed by the libellant were caused by the mutual fault of the steam-tug "Kate" and the steamboat "Atlas," and that the libellants do recover against the steamboat "Atlas" one-half of the damages by them sustained by reason of the collision, and that the cause be referred to a commissioner to ascertain the amount.

Pursuant to the decretal order, the commissioner reported that the whole amount of the damages to the date of the report was $13,617.02, and that the libellants were entitled to recover one-half of that sum; to wit, $6,808.51. Exceptions were filed by the libellants to that report, upon the ground that they are entitled to the entire amount of the damages sustained; but the court overruled the exception, confirmed the report, and entered a final decree in conformity with the report. Both parties appealed to the Circuit Court, where the parties having been again fully heard, the Circuit Court entered a final decree affirming the decree of the District Court, and both parties appealed to this court.

Since the appeal was entered here, the parties have been fully heard, and they have filed in the cause a written stipulation, to the effect following: 1. That the claimants insist only that the decree of the Circuit Court should be affirmed, the parties agreeing that the collision occurred through the mutual fault of the steamboats "Atlas" and "Kate." 2. That the libellants admit that both the steamboats were in fault, but insist that they are entitled to recover for their full loss, and that the decree, being for a moiety only, should be reversed on that account, and that a decree should be entered for the entire damages that the owners of the cargo of the canal-boat sustained by the collision.

Other questions involved in the record being waived, the court will confine its attention to the single inquiry, whether the ruling of the court below in overruling the exception of

the libellants to the report of the commissioner is or is not correct.

Satisfaction to the libellant for the injury sustained is the true rule of damages in a cause of collision, by which is meant that the measure of compensation shall be equal to the amount of injury received, and that the same shall be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss, without any deduction for new materials used in making repairs, as is prescribed in the law of marine insurance. Complete recompense for the injury is required; nor is the guilty party in such a case entitled to deduct from the amount of the damages any sum which the libellant has received from an underwriter on account of the same injury, the rule being, that a wrong-doer in such a case cannot claim the benefit of the contract of insurance if effected by the person whose property he has injured. Maude & P. on Ship. (3d ed.) 465; Flanders on Ins. 591.

Instead of that, the law is well settled, that the reception of the amount of the loss from the insurers is no bar to an action subsequently commenced against the wrong-doer to recover compensation for the injury occasioned by the collision. *Mason* v. *Sainsbury*, 3 Doug. 61.

Authorities to that effect are numerous; and it was expressly decided by the judges, in *Yates* v. *Whyte et al.*, 4 Bing. N. C. 272, that the defendants in such a case were not entitled to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by insurers in respect of such damage.

None can recover compensation twice in respect of the same injury; but what the plaintiff recovers under his policy of insurance is not compensation for damages, but a payment under a contract independent of the claim against the wrong-doer; and the better opinion is, that the principle which excludes double compensation does not strictly apply to obligations not in the same right. May on Ins. 555.

Compensation by the wrong-doer after payment by the insurers is not double compensation, for the plain reason that insurance is an indemnity; and it is clear that the wrong-doers

are first liable, and that the insurers, if they pay first, are entitled to be subrogated to the rights of the insured against the insurers.

Support to that proposition is found everywhere; and some of the authorities go further, and decide, that the suit against the wrong-doer for the benefit of the insurer must be prosecuted in the name of the injured party. *Randall* v. *Cockran*, 1 Ves. Sen. 90; *Godsall* v. *Boldero*, 9 East, 81; *Irwing* v. *Richardson*, 1 B. & Adol. 196; *Case* v. *Davidson*, 5 Maule & Selw. 81; *Clark* v. *Blything*, 2 Barn. & Cressw. 256.

Suppose that is so, still it cannot affect the question in this case, which is, whether the decree should be for a moiety only of the damages occasioned by the collision, or for the entire amount. Waiving the question of parties, it is clear that the respondents are liable for one or the other of those amounts. 1 Park on Ins. (8th ed.) 330; *Insurance Company* v. *Sainsbury*, 3 Doug. 245; *Yates* v. *Whyte et al.*, *supra;* 2 Marsh on Ins. (2d ed.) 794; 2 Park on Ins. (8th ed.) 969; 2 Phillips on Ins. (5th ed.), sect. 2001.

Beyond all doubt, the owners of a ship or vessel injured by collision may proceed to recover compensation either against the owners, or against the master personally, or against the ship herself, at their election. *The Volant*, 1 W. Rob. 387; Maude & P. on Ship. (3d ed.) 466.

Argument to support that proposition is unnecessary; but it is equally well settled that the cargo which is on board the colliding vessel at the time the collision occurs is not liable for the damage done by the ship in which it is carried. *The Victor*, 1 Lush. Adm. 76.

Damage is sometimes said to be done by the ship, but that is a mere form of expression; the truth being, that it is either done by the owner, or by the master and crew employed by the owner, who is responsible for their conduct; because, being employed by the owner, they are his agents, but they are not the agents or servants of the owner of the cargo, and for that reason the cargo is not liable for the consequences of a collision.

Matters of fact need not be discussed in this case, as it is admitted by the parties that the collision occurred through the

mutual fault of the steamboat "Atlas" and the steam-tug "Kate" which had the canal-boat in tow with her cargo on board. Both courts below gave the libellants a moiety of the damages ascertained by the commissioner, and the claimants insist that the decree of the Circuit Court is correct. On the other hand, the libellants insist that they are entitled to recover the entire damages occasioned by the collision, and that the decree of the Circuit Court should be reversed.

Disasters of the kind occur from different causes and under very different circumstances, and the rules of admiralty law applicable in the determination of such controversies vary to meet the varying circumstances which give rise to the accident. Judicial experience has given no better guide than that furnished by Lord Stowell, than whom no abler judge ever presided over the Admiralty Court of the parent country. Speaking of such disasters, he remarked to the effect that there were four possibilities under which an accident of the kind may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*. In that case, the misfortune must be borne by the party on whom it happens to fall, the rule being, that the party not injured is not responsible to the losing party in any degree. Secondly, a misfortune of the kind may arise when both parties are to blame; as where it appears that there has been a want of due diligence or of skill on both sides; and he adds, that in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by both. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Lastly, he remarks, that it may happen from the fault of the ship which ran the other down; and in that case the injured party is entitled to an entire compensation from the other. *The Woodrop*, 2 Dodson, 85.

Freedom from fault is a good defence in a cause of collision against a claim for damage promoted by an injured party, and it entitles the promoter of such a suit to full compensation from the opposite party, if proved to be guilty. Where neither party is in fault, and the damage was the result of unavoidable accident, the rule that the loss must be borne by the party on whom it

fell is one of universal application. *The Shannon*, 1 W. Rob. 470; *The Itinerant*, 2 id. 243; *The Locklibo*, 3 id. 318; *The Morning Light*, 2 Wall. 560.

Under the second of the foregoing rules, — when both vessels are in fault, — the sums representing the damages are added together, and the amount is equally divided between the parties; and that rule prevails in all cases where there is mutual fault, even though one of the vessels may have been much more in fault than the other. Fault being imputed to both vessels, and the charge being proved, the inquiry which was most to blame is immaterial, as the damages must be divided between the two, according to the rule provided in the admiralty courts. *Vaux* v. *Sheffer*, 8 Moore, P. C. C. 87.

Attempt was made in the Court of Sessions in Scotland to establish an exception to that rule; and the court finding, in a case where both vessels were in fault, that the greater share of the blame rested on one, decided that her owners were liable for two-thirds of the damage. Maude & P. on Ship. (3d ed.) 470; *Le Neve* v. *Shipping Co.*, 1 Shaw's Cas. 378.

Prompt appeal was taken from that decree to the House of Lords, where the decree was reversed, upon the ground that the true rule was the one laid down by Lord Stowell, that, where a misfortune of the kind happens from the want of due diligence or skill on both sides, the loss must be apportioned between them, as having been occasioned by the fault of both. *Hay* v. *Le Neve*, 2 Shaw's H. of L. Cas. 400; *The Washington*, 5 Jur. 1067.

Both vessels being in fault, the positive rule of the court of admiralty, says Lord Denman, requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. *De Vaux* v. *Salvador*, 4 Ad. & El. 431.

Innocent parties in cases of the kind are entitled to full compensation, but the admiralty rule as between wrong-doers is that the combined amount of the damage shall be divided between the owners of the two offending vessels. Text-writers of standard authority, as well as courts, have adopted the same rule, and hold, that, where both vessels are in fault, the loss must be apportioned between them, as having been occasioned by the

fault of both. Maclachlan on Ship. (2d ed.) 286; 1 Pars. on Ship. 527; Williams & Bruce, Prac. 71.

All of these writers, and many others, lay down the rule, that, where both parties are to blame, the loss must be apportioned between them; and the authors last cited say that the rule is founded upon the principle which, from ancient times, has been applied in the Admiralty Court, that damage by a common fault shall be considered as a common loss. *The Lima*, 4 Jur. N. S. 147; *The Aurora*, Lush. Adm. 329.

Strict justice would require, said Dr. Lushington, that the burden of making good the loss should fall upon the two delinquents in proportion to their delinquency, but in practice the proportion is impossible to be ascertained. Such a rule, if adopted, would be utterly impracticable, for the reason that the court cannot apportion the loss according to the *quantum* of neglect or culpability on the one side and the other; hence equal apportionment is the universal rule where there is mutual fault, even though the fault on one side may be much greater than the fault on the other. *The Milan*, Lush. Adm. 401; *The Linda*, 4 Jur. N. S. 147.

Courts and text-writers in all, or nearly all, of these cases appear to have proceeded, throughout the period which they cover, upon the ground that the rule of apportionment requiring each party, where both are in fault, to bear a moiety of the loss, applies solely to the case of the wrong-doers, and that proof of entire innocence or freedom from fault is a good defence to every portion of a claim for damage, and that it entitles the promoter of a suit for such a claim to full compensation for his loss from the guilty party. Opposed to that conclusion is the case of *The Milan*, Lush. Adm. 401, in which Dr. Lushington remarks to the effect that the practice of the Court of Admiralty appears to have been uniform, that, where both ships are to blame, the owners of cargo equally with the owners of ships recover a moiety of their damages, except in cases where the statute prescribes a different rule; and the learned judge refers to the reported case of *Hay* v. *Le Neve*, 2 Shaw's Sc. App. 405, in support of the proposition.

Other cases are also referred to for the same purpose; but the reporter appends a note to the case, that the other cases are

not reported. Enough appears in that case to show that both ships were in fault, — the one for the want of lights, and the other for the want of a sufficient lookout; and the decree was that the whole of the damages sustained by the libellants for the ship and cargo should be borne equally by the litigant parties; but it was the owners of the injured ship who promoted the claim, and it does not appear that the question before the court here received any consideration at the bar or by the court.

Two admissions are made by the court in the case of the "Milan," which it is important to notice, as they are undoubtedly correct, and will afford much aid in disposing of the question involved in the present record: 1. That the owner of the cargo, in such a controversy, could recover for his whole loss in an action at law. 2. That the owner of the cargo, in such a case, is to be considered as a perfectly innocent party.

Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue them separately, or if he sues one separately and has judgment, he cannot afterwards sue them all in a joint action: because the prior judgment against one is, in contemplation of law, an election as to that one to pursue his several remedy, but it is no bar to the suit for the same wrong against any one or more of the other wrong-doers. *Murray* v. *Lovejoy*, 2 Cliff. 196; s. c. 3 Wall. 19; *Smith* v. *Hines*, 2 Sumn. 348; *Webster* v. *Railroad*, 38 N. Y. 261.

Acts wrongfully done by the co-operation and joint agency of several persons constitute all the parties wrong-doers, and they may be sued jointly or severally; and any one of them, said Spencer, C. J., is liable for the injury done by all, if it appear either that they acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others. *Guile* v. *Swan*, 19 Johns. 382.

Confirmation of the second admission is not required, as sufficient has already been remarked to show that the proposition is correct, and that it is universally approved.

Shippers having lost cargo by such a disaster, may pursue their remedy by libel *in personam* against the owner of the offending vessel, or they may, at their election, proceed in an action at law, either in the Circuit Court, if the parties are citizens of different States, or in a State court, as in other cases where the Federal and State courts have concurrent jurisdiction. *Steamboat Company* v. *Chase*, 16 Wall. 533; *The Belfast*, 7 id. 644.

Suitors have a right to a common-law remedy in all cases where the common law is competent to give it. Consignees or shippers injured in their property by collision may proceed *in rem* in the admiralty, or they may bring a suit *in personam* in the same jurisdiction, or they may elect not to go into admiralty at all, and may resort to their common-law remedy in the State courts or in the Circuit Court of the United States, if they can make proper parties to give that court jurisdiction.

Common-law remedies in cases of tort, as given in common-law courts, and suits *in personam* in the admiralty courts of this country, bear a strong resemblance to each other in respect to parties, and the effect of a recovery by the injured party against one or all of the wrong-doers, and the extent of redress to which an innocent party is entitled against the wrong-doer. *Simpson* v. *Hand*, 6 Whart. 321.

Different systems of pleading and modes of proceeding prevail in the two jurisdictions, and in some few respects there is a difference in the rules of evidence adopted in the admiralty court from those which prevail in common-law actions. All know that the libel in the Admiralty Court takes the place of the declaration in an action at law, and that the answer is the substitute for the plea of the defendant.

Contributory negligence on the part of the libellant cannot defeat a recovery in collision cases, if it appears that the other party might have prevented the disaster, and that he also did not practise due diligence, and was guilty of negligence, and failed to exercise proper skill and care in the management of his vessel. Proof of the kind will defeat a recovery at common

law; but the rule in the admiralty is, that the loss in such a case must be apportioned between the offending vessels, as having been occasioned by the fault of both; but the rule of the common law and of the admiralty is the same where the suit is promoted by an innocent party, except that the moiety rule may be applied in the admiralty, if all the parties are before the court, and each of the wrong-doers is able to respond for his share of the damage. Subject to that qualification, the remedy of the innocent party is substantially the same in the admiralty as in an action at law, the rule being, that in both he is entitled to an entire compensation from the wrong-doer for the injury suffered by the collision. *Colegrove* v. *Railroad*, 20 N. Y. 493; *Catlin* v. *Hills*, 8 C. B. 125; *Vanderplank* v. *Miller*, 1 Moo. & Mal. 169.

Goods shipped as cargo, and their owners, as in the case before the court, are innocent of all wrong; and the owners of the cargo may sue the owners of one of the ships, or both, and they may sue at law or go into the admiralty, at their election, and, having proved their case, they are as much entitled to full compensation in the admiralty as they would have been if they had elected to pursue their common-law remedy, saved to them by the proviso contained in the ninth section of the Judiciary Act. 1 Stat. 77.

Co-wrong-doers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libellant, nor is it a question in this case whether the party served may have process to compel the other wrong-doers to appear and respond to the alleged wrongful act.

Even suppose that the case of the "Milan" is a correct exposition of the admiralty law, as administered in the jurisdiction where the decision was made, still it cannot control the question before the court, for the reason that the rule of practice here is different, as is clearly shown by the judgment of this court delivered at the last term of the court. *The Alabama and The Game-cock*, 92 U. S. 695.

Counsel of experience and ability attempted to maintain in that case the same theory as that now advanced in argument here by the appellees, and they cited *The Milan*, Lush. Adm. 408, *The Atlas*, 4 Ben. 28, s. c. 10 Blatch. 460, in sup-

port of the proposition which they desired the court to adopt. Suffice it to remark, by the way of explanation, that all the parties interested in the case then under argument were before the court; which is all that need be said in respect to the operation of such a theory, if applied in a case where the parties interested were duly served and were present, and it did not appear that each of the respondents was not able to respond for a moiety of the damages suffered by the owner of the cargo.

Contingencies are also portrayed, in which it is conceded that the theory may be applied without serious injustice or inconvenience; but the court proceeds to say, that it would seem to be just that the owner of the cargo who is supposed to be free from fault should recover the damage done thereto from those who caused it, adding, that if he cannot recover from either of them such party's due share, he ought to be able to recover it from the other, and that the same reason for a division of the damage does not apply to the owner of the cargo as applies to the owners of the ships. Remarks are then made to show that the moiety rule is both just and expedient between the ships where both are in fault; but the court proceeds to say, that if either is unable to pay his moiety of damage, there is no good reason why the owner of the cargo should not have a remedy over against the other, and finally remarks, that the moiety rule was adopted for the better distribution of justice between wrong-doers, and that it ought not to be extended so far as to inflict positive loss to innocent parties. *The Gregory*, 9 Wall. 516.

Much care was taken in framing the decree in that case, which of itself shows to a demonstration that the court never intended to adopt a theory which would fail to give innocent parties full compensation suffered by a collision, and that they never meant to extend the moiety rule so as to do injustice to an innocent tow or to the owner of cargo. Such a result can never be sanctioned by the justices of this court, so long as they adhere to the rule that when a third party has sustained an injury to his property, from the co-operating consequences of two causes, though the persons producing them may not be in intentional concert to occasion such a result, the injured

person is entitled to compensation for his loss from either one or both of them, according to the circumstances of the incident. *The New Philadelphia*, 1 Black, 76; *Boyer* v. *Sturgis*, 24 How. 122.

Except when both parties are to blame, the offending party can recover nothing, whether he pursues his remedy in the admiralty or at common law. Where both are to blame, neither can recover any thing at common law, but the admiralty requires each to suffer a moiety of the loss, to be ascertained in the manner already explained.

Parties without fault, such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damage which they suffer from the wrong-doers, and they may pursue their remedy *in personam*, either at common law or in the admiralty, against the wrong-doers or any one or more of them, whether they elect to proceed at law or in the admiralty courts.

Such a party is not required in any event to bear any portion of the loss suffered by others, the rule being, that where the collision occurs exclusively from natural causes, without any fault of either of the colliding vessels, the loss shall rest where it happens to fall, on the principle that no one is responsible for such a disaster, when produced by causes over which human skill and prudence can exercise no control.

Inevitable accident is a good defence in such a controversy, where both vessels are free from blame; but it is utterly unavailing if either or both were in fault. Where the vessel of the respondent is alone in fault, the libellant is entitled to recover full compensation for his damages; and the rule is, that if the vessel of the libellant is alone in fault, the decree must be for the respondent, that the libel be dismissed.

Cases also arise where both vessels are in fault; and the repeated decisions of this court have established the rule, that in that contingency the damages shall be equally apportioned between the offending vessels, as having been occasioned by the fault of both. *The Catharine*, 17 How. 177; *The Sunnyside*, 91 U. S. 216; *The Continental*, 14 Wall. 355; *The Morning Light*, 2 id. 560; *The Pennsylvania*, 24 How. 313.

Innocence entitles the loser to full compensation from the

wrong-doer, and it is a good defence against all claims from those who have lost. Individual fault renders the party liable to the innocent loser, and is a complete answer to any claim made by the faulty party, except in a case where there is mutual fault, in which case the rule is that the combined amount of the loss shall be equally apportioned between the offending vessels.

Decree reversed and cause remanded, with directions to reverse the decree of the District Court, and enter a new decree in favor of the libellants for the entire damages as ascertained by the commissioner.

MR. JUSTICE BRADLEY did not sit in this case.

KIMBALL v. EVANS.

Where a petition for the removal of a suit filed under the act of March 2, 1867 (14 Stat. 558), was, in accordance with the practice of the State, reserved for the decision of the Supreme Court, and the latter dismissed the petition, and remanded the cause to the inferior court for further proceedings according to law, — *Held*, that this court has no jurisdiction.

ERROR to the Supreme Court of the State of Ohio.

Pending a suit in the District Court of Stark County, Ohio, a petition was filed, under the act of March 2, 1867 (14 Stat. 558), for its removal to the Circuit Court of the United States for the Northern District in that State. This petition presenting for consideration, in the opinion of the District Court, difficult and important questions, the cause was reserved, in accordance with the practice in Ohio, to the Supreme Court "for its decision on said petition for the removal of the cause to the Circuit Court." The Supreme Court, after hearing, dismissed the petition and remanded the cause to the District Court "for further proceedings according to law."

To reverse this judgment the present writ of error was brought.

Submitted on printed arguments by *Mr. H. E. Paine* for the defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It is clear we have no jurisdiction in this cause. The judgment of the Supreme Court is not the final judgment in the suit. It disposed finally of one of the questions involved in the suit, but not of the suit itself. The suit is still pending in the District Court, and it is not impossible that the parties now complaining may be satisfied with the judgment which they may in the end be able to secure in the State courts. If not, after a final judgment has in fact been rendered by the highest court of the State in which a decision in the suit can be had, the case may be again brought here for a determination of the questions arising upon the petition for removal. But in the present condition of the record the writ must be

Dismissed.

TALTY v. FREEDMAN'S SAVINGS AND TRUST COMPANY.

Where the pledgee parts with the pledge to a *bona fide* purchaser without notice of any right or claim of the pledgor, the latter cannot recover against such purchaser without first tendering him the amount due on the pledge.

ERROR to the Supreme Court of the District of Columbia.

This was replevin by the plaintiff to recover a collateral security pledged to one Kendig, a broker, and by him sold to the defendant. Under the instructions of the court below, the jury found a verdict for the defendant; judgment was rendered thereon, and the plaintiff sued out this writ of error. The facts are fully set forth in the opinion of the court.

Mr. Joseph H. Bradley for the plaintiff in error.

The chattel replevied was a mere *chose in action*, and was not assigned by the owner. His indorsement in blank did not, at law, transfer any title to it.

Kendig had merely the option to purchase the collateral if the note was not paid.

If the plaintiff's testimony was true, no tender or offer of payment to the defendant was necessary. *Wilson* v. *Little et al.*, 2 Comst. 443.

Mr. Enoch Totten for the defendant in error.

The rule of exemption as to tender does not apply in a suit against a *bona fide* purchaser to recover possession of the pledge. Tender to the defendant of the amount due by the plaintiff on his note was necessary to enable him to recover. *Demainbray* v. *Metcalf*, 2 Vern. 691; *Little* v. *Baker*, Hoff. Ch. 487; *Jarvis's Adm.* v. *Rodgers*, 15 Mass. 408; *Baldwin* v. *Ely*, 9 How. 580; 3 Pars. on Contr. 274; Story on Bailm., sect. 327; *Lewis* v. *Mott*, 36 N. Y. 395; *Donald* v. *Suckling*, Law Rep. 1 Q. B. 585; *Johnson* v. *Stear*, 15 C. B. N. S. 330.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This was an action of replevin, prosecuted by the plaintiff in error. The judgment was against him. The bill of exceptions discloses all the evidence given by both parties. The facts lie within a narrow compass, and, except as to one point, which in our view is of no consequence in this case, there is no disagreement between them.

Talty had a claim against the city of Washington for work and materials, amounting to $6,096.75. He submitted it to the proper authority, and received the usual voucher. On the 4th of January, 1872, the claim was approved by the commissioners of audit, and a certificate to that effect was given to him. On the 6th of that month he employed Kendig, a broker, to negotiate a loan for him. With that view he placed in Kendig's hands his own note for $3,000, having sixty days to run, with interest at the rate of ten per cent per annum, payable to his own order, and indorsed by him in blank. He also placed in the hands of Kendig, to be used as collateral, his claim against the city, indorsed in blank also. The same day Kendig negotiated the loan and paid Talty the amount of the note, less the discount. Kendig sold the claim against the city to the defendant for ninety-six cents on the dollar. The money was paid to him. The purchase was made in good faith, and without notice of any right or claim on the part of Talty. With the proceeds of this sale Kendig took up the note. A few days before its maturity Talty called on Kendig and offered to pay the note, and demanded back the collateral. Kendig declined to accede to the proposition. He insisted that the

understanding between him and Talty was that he was to receive no commission for negotiating the loan, but that he was to have instead the right to sell or take the claim against the city, if he chose to do so, at ninety cents on the dollar. He offered to pay Talty for the claim, making the computation at that rate, and deducting the amount of the note. This Talty refused, and insisted that Kendig had no authority with respect to the claim but to sell, in the event of default in the payment of the note at maturity. Each party testified accordingly. Subsequently, and after the maturity of the note, Talty demanded from the defendant in error the vouchers relating to the claim. The defendant refused to give them up, and this suit was thereupon instituted. The marshal took them under the writ of replevin, and delivered them to the plaintiff.

No tender was made by Talty to the defendant in error, nor to Kendig, and nothing was said by him upon the subject of paying his note to either, except the offer to Kendig, as before stated.

After receiving back the collateral, Talty was paid the full amount of it by the commissioners of the sinking fund of the city. The only dispute between the parties as to the facts was that in relation to the authority of Kendig touching the claim.

Upon this state of the evidence the court instructed the jury to find for the defendant, and to assess the damages at the value of the claim. This was done, and judgment was entered upon the verdict. The instruction was excepted to.

Before entering upon the examination of the merits of the controversy, it may be well to consider for a moment the situation of the several parties. Talty has received and holds the proceeds of his note and the full amount of the collateral. Kendig holds the note and the amount of the collateral, less four per cent. The defendant in error, the *bona fide* purchaser of the claim, is out of pocket the amount paid for it to Kendig, and has the burden of this litigation and the security afforded by the replevin bond of Talty.

The question to be determined is, whether a tender to the defendant in error by Talty of the amount due on his note before bringing this suit was indispensable to entitle him to recover.

Kendig was not a factor with a mere lien. He was a pledgee. The collateral was placed in his hands to secure the payment of the note. It was admitted by Talty that Kendig was authorized to sell it if the note were not paid at maturity. Kendig had a special property in the collateral. He was a pawnee for the purposes of the pledge. Judge Story says (Bailm. sects. 324–327), "The pawnee may by the common law deliver over the pawn to a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee."

"Whatever doubt may be indulged in, in the case of a mere factor, it has been decided, in the case of a strict pledge, that, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

Numerous authorities are cited in support of these propositions. The subject as to the point last mentioned was learnedly examined in *Jarvis's Adm.* v. *Rodgers*, 15 Mass. 369. That was the case of a re-pledge by the first pledgee. The rule of the text as to the rights of the sub-pledgee was distinctly affirmed.

The case of *Lewis* v. *Mott*, 36 N. Y. 395, was in some of its leading points strikingly like the case before us. There, Brown had placed certain collaterals in the hands of Howe to secure the payment of two promissory notes of Brown held by Howe; Howe sold the notes and collaterals to Varnum; Brown offered to pay Varnum the amount of the notes, and demanded the collaterals; Varnum refused to give them up, and Brown sued for them. The court said, "It must be conceded that Varnum, by the purchase of those securities from Howe, acquired the lien and interest of Howe, whatever that may have been; and the plaintiff's assignee, to have entitled himself to a re-delivery of these securities, must have tendered the amount

of the lien. There was simply an offer to pay Varnum the amount due upon these notes. It was unattended with any tender of the amount due, and was insufficient to extinguish the lien and thus entitle Brown to the return of the notes. . . . The offer to pay is not the equivalent for an actual tender. *Bateman* v. *Pool*, 15 Wend. 637; *Strong* v. *Black*, 46 Barb. 222; *Edmonson* v. *McLeod*, 16 N. Y. 543." See also *Baldwin* v. *Ely*, 9 How. 580; *Merchants' Bank* v. *The State Bank*, 10 Wall. 604.

The English law is the same. In *Donald* v. *Suckling*, Law Rep. 1 Q. B. 585, the case was this: A. deposited debentures with B. as security for the payment of a bill indorsed by A. and discounted by B. It was agreed, that, if the bill was not paid when due, B. might sell or otherwise dispose of the debentures. Before the maturity of the bill, B. deposited the debentures with C., to be held as security for a loan by him to B. larger than the amount of the bill. The bill was dishonored; and, while it was unpaid, A. sued C. in detinue for the debentures. It was held that A. could not maintain the suit without having paid or tendered to C. the amount of the bill. The case was elaborately considered by the court. See also *Moore* v. *Conham*, Owen, 123; *Ratcliffe* v. *Davis*, Yelv. 178; *Johnson* v. *Cumming*, Scott's C. B. N. S. 331.

A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes *ipso facto* the title of the second pledgee; but that there can be no recovery against him without tender of payment is equally well settled. *Donald* v. *Suckling*, *supra*; *Jarvis's Adm.* v. *Rodgers*, *supra*; S. C. 13 Mass. 105.

But it is suggested that the note was in the hands of Kendig, and that Talty could not, therefore, safely pay the amount due upon it to the holder of the collateral. The like fact existed in *Donald* v. *Suckling*. It is not adverted to in the arguments of counsel, nor in the opinions of the judges in that case. It could not, therefore, have been regarded by either as of any significance. The answer here to the objection is obvious. The note, a few days before its maturity, was in the hands of Kendig. There being no proof to the contrary, it is to be presumed to have remained there. This suit was commenced after

it matured. Talty might then have paid the amount due upon it to the defendant in error, and could thereupon have defended successfully in a suit on the note, whether brought by Kendig or any indorsee taking it after due. He might also, after making the tender, have filed his bill in equity, making Kendig and the savings-bank defendants, and thus have settled the rights of all the parties in that litigation. Having sued at law without making the tender, it is clear he was not entitled to recover.

The instruction given by the court to the jury was, therefore, correct.

The proceeding and judgment were according to the local law regulating the action of replevin in the District of Columbia.

In the discussion here our attention was called only to the question of tender: nothing was said as to the rule of damages laid down by the court below.

There is another question arising upon the record, and that is, whether the defendant in error, being a *bona fide* purchaser, did not, under the circumstances, acquire the absolute ownership of the claim. Story on Agency, sect. 127; *Addis* v. *Baker*, 2 Anst. 229; *McNiel* v. *The Tenth National Bank*, 46 N. Y. 325; *Fatman* v. *Lobach*, 1 Duer, 524; *Weirick* v. *The Mahoning County Bank*, 16 Ohio, 297; *Fullerton* v. *Sturgess*, 4 Ohio St. 529.

But as the point has not been argued, we express no opinion upon the subject. *Judgment affirmed.*

BRANT v. VIRGINIA COAL AND IRON COMPANY *et al.*

1. Where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life, and to do with as she sees proper before her death," the wife took a life-estate in the property, with only such power as a life-tenant can have, and her conveyance of the real property passed no greater interest.
2. For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury.
3. Where the estoppel relates to the title of real property, it is essential to the

application of the doctrine, that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel.

APPEAL from the Circuit Court of the United States for the District of West Virginia.

In April, 1831, Robert Sinclair, of Hampshire County, Va., died, leaving a widow and eight surviving children. He was, at the time of his death, possessed of some personal property, and the real property in controversy, consisting of one hundred and ten acres. By his last will and testament he made the following devise: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal; that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with every thing that I possess, to have and to hold during her life, and to do with as she sees proper before her death." The will was duly probated in the proper county.

In July, 1839, the widow, for the consideration of $1,100, executed a deed to the Union Potomac Company, a corporation created under the laws of Virginia, of the real property thus devised to her, describing it as the tract or parcel on which she then resided, and the same which was conveyed to her "by the last will and testament of her late husband." As security for the payment of the consideration, she took at the time from the company its bond and a mortgage upon the property. The mortgage described the property as the tract of land which had on that day been conveyed by her to the Union Potomac Company.

In 1854 this bond and mortgage were assigned to the complainant and Hector Sinclair, the latter a son of the widow, in consideration of $100 cash, and the yearly payment of the like sum during her life. Previous to this time, Brant and Hector Sinclair had purchased the interest of all the other heirs, except Jane Sinclair, who was at the time, and still is, an idiot, or an insane person; and such purchase is recited in the assignment, as is also the previous conveyance of a life-interest to the company.

In July, 1857, these parties instituted suit for the foreclosure of the mortgage and sale of the property. The bill described the property as a tract of valuable coal land which the company had purchased of the widow, and prayed for the sale of the estate purchased. Copies of the deed of the widow and of the mortgage of the company were annexed to the bill. In due course of proceedings a decree was obtained directing a sale, by commissioners appointed for that purpose, of the property, describing it as "the lands in the bill and proceedings mentioned," if certain payments were not made within a designated period. The payments not being made, the commissioners, in December, 1858, sold the mortgaged property to one Patrick Hammill, who thus succeeded to all the rights of the Union Potomac Company.

The defendant corporation, the Virginia Coal and Iron Company, derive their title and interest in the premises by sundry mesne conveyances from Hammill, and in 1867 went into their possession. Since then it has cut down a large amount of valuable timber, and has engaged in mining and extracting coal from the land, and disposing of it.

Brant, having acquired the interest of Hector Sinclair, brought the present suit to restrain the company from mining and extracting coal from the land, and to compel an accounting for the timber cut and the coal taken and converted to its use.

The court below dismissed the bill, whereupon Brant brought the case here.

Argued by *Mr. John J. McKinnon* and *Mr. George W. Brandt* for the appellant.

Under the will, Nancy Sinclair took only a life-estate. The testator having failed to devise the fee, it descended to his heirs. She had no power, nor did she attempt to divest them of it.

Real and personal property of an intestate is, under the statute of Virginia, distributed equally among his heirs-at-law. The rule is the same where the owner in fee of lands devises them to another for life, without making any specific disposition of the inheritance.

A rule never to be lost sight of in the construction of wills is, that the heir is not to be disinherited without an express

devise, or implication importing so strong a probability, that an intention to the contrary cannot be supposed. 1 Redf. on Wills, p. 425, n. 5, p. 434, sect. 18; *Allen's Ex'r* v. *Allen*, 18 How. 391.

Negative words are not sufficient to exclude the title of the heir. There must be an actual gift to some other definite object. *Fitch* v. *Weber*, 6 Hare, 145; 1 Redf. on Wills, 425.

Courts will look at the circumstances under which the devisor makes his will, as to the state of his property, his family, and the like. 1 Redf. on Wills, 425.

In a deed, the words govern the intention. In a will, the intention governs the words. *Edwards* v. *Bibb*, 43 Ala. 666.

It is an old and equitable rule, that the reversion is not to be defeated, or the heirs despoiled by implication, without express words. *Dashwood* v. *Peyton*, 18 Ves. 40.

No words authorizing Mr. Sinclair to sell and convey the fee can be found in the will, either in connection with the life-estate or elsewhere.

The leading case of *Bradley* v. *Westcott*, 13 Ves. 445, is strikingly analogous to that at bar. In both there is an express devise for life, followed by an ambiguous authority or discretion; and in each the authority or power is confined to natural life.

Applying the doctrine in that case to this, it cannot be contended that the still less potent and greatly more ambiguous language following the express devise for life in this case is to have a different meaning or be differently construed. *Smith* v. *Bell*, 6 Pet. 80, *Gregory* v. *Cowgill*, 19 Mo. 415, *Boyd et al.* v. *Strahan*, 36 Ill. 355, *Seigwald* v. *Seigwald*, 37 id. 431, and *Cox et al.* v. *Butt et al.*, 22 Ark. 568, are to the same effect as *Bradley* v. *Westcott*, *supra*, and settle the question as to what estate Mrs. Sinclair took, and what power she had under the will.

The complainant is in no manner or way estopped by reason of the foreclosure proceeding or by the sale thereunder. To estop him in any view of the case, the defence must show that his language or conduct was the direct motive or inducement to the purchase. This has not even been attempted. *Ware* v. *Cowles*, 24 Ala. 446; *Jones* v. *Cowles*, 26 id. 612; *Brewer*

v. *Brewer*, 19 id. 431; *Morton* v. *Hodgdon*, 32 Me. 327; *Cambridge Inst.* v. *Rittlefield*, 6 Cush. 216; *Watkins* v. *Peck*, 13 N. H. 360; *Darlington's Appeal*, 1 Harris, 430; *Carpenter* v. *Stilwell*, 1 Kern. 61.

Ignorance of the true state of the title on the part of the purchaser must concur with wilful misrepresentation or fraudulent concealment on the part of the vendor. *Crest* v. *Jack*, 3 Watts, 238; *Hepburn* v. *McDowell*, 17 Serg. & R. (Pa.) 383; *Ferris* v. *Coover*, 10 Cal. 509; *Casey* v. *Inloes*, 1 Gilm. 430; *Lawrence* v. *Brown*, 1 Seld. 394; *Hill* v. *Epley*, 7 Casey, 331; *Goodson* v. *Beacham*, 24 Ga. 150; *Parker* v. *Parker*, 2 Met. 421.

No estoppel will arise in the absence of actual fraud, unless the purchaser was not only ignorant of the true state of the title, but had no means of acquiring knowledge by a recourse to the record. *Bigelow* v. *Topliff*, 25 Vt. 273; *Carter* v. *Champion*, 8 Conn. 554.

Argued by *Mr. E. Wyatt Blanchard* for the appellee.

Notwithstanding the assumed defect in Mrs. Sinclair's original title under the will, the appellant is entitled to no relief, and is estopped from denying the validity of the appellee's title: first, as privy in estate of Mrs. Sinclair, under whom he claimed in the foreclosure proceedings; second, by his own declarations of record in those proceedings, his non-assertion at that time of the title he now claims, and by various acts in connection with the foreclosure sale, and subsequently thereto.

It is not necessary to the application of the doctrine of estoppel that fraud in fact should be charged or shown. It rests on a broad principle of equity, which will not permit a party to a transaction, even when made under a mistake of title, to receive its fruits, and afterwards repudiate it. Assertions innocently made, but which mislead others; silence as to conflicting claims, or as to facts which should have been disclosed; recitals in deeds; descriptions of title; covenants; warranties, — all or any will give rise to the application of this principle for the protection of a purchaser, in the class of cases known as cases of constructive fraud.

It is a principle of universal application, that a person assenting to an act, and deriving and enjoying a title under it,

shall not be permitted to impeach it. 2 Wash. Real. Prop. b. 3, p. 472; 11 How. 322, 325, 326; 5 Johns. Ch. 184; 1 id. 354; 12 Wall. 358; 13 id. 291.

Nor can any controlling authority be found for applying the rule *caveat emptor* to this class of cases.

The evidence is uncontradicted, that the sum agreed to be paid to Mrs. Sinclair was at the time the full value of the property in fee-simple, subject to the life-estate reserved by her. Whatever, therefore, she conveyed was to be paid for as a fee-simple estate. Her acceptance of the mortgage in fee, to secure the payment of the purchase-money, was a distinct act *in pais*, recognizing the existence of a title in fee in the Union Potomac Company.

In the application of the doctrine of estoppel, the question whether the acts done by the parties are legally effectual is excluded. The sole question is, What did they intend to do? In this case, the conclusion is irresistible, that Mrs. Sinclair intended to part with the fee for a then fair price. Her opinions, purposes, or unknown views must yield to the force of her solemn acts; and for the protection of others against her and her privies in estate, if the purchaser believed himself acquiring a fee as against her and them, his estate is a fee. Although it is not intended to charge that the complainant in this and in the foreclosure case committed the fraud of conducting that proceeding with his present opinion of his title, or with the purpose of selling the lands, receiving the proceeds, and then reclaiming them, the effect is the same as if he had acted with such guilty purpose. Every line of the record of that proceeding shows that the officers of the court did not sell the life-estate of Mrs. Sinclair, but that they did offer "the lands mentioned in the proceedings," with that life-estate reserved, in such explicit terms, that no successful bidder could fail to conclude that he was the purchaser of the fee.

The power of disposition of Mrs. Sinclair, under the will of her husband, equally affects all descriptions of the property devised. Nothing is to be found in the will to indicate any purpose on his part to distinguish her dominion over his real and personal estate.

The construction claimed by the appellant requires that the

words of power shall be held to refer to the words creating the estate, so as to read, "to have and to hold during life, and to do with as she sees proper, according to the powers of a life-tenant." When the testator gave all to his wife, to have and to hold during her life, he, without superadded words, gave every power incident to that estate. The appellant, in effect, rejects the words of power, and treats them as surplusage.

That construction rests on the presumed intention of the testator to die intestate as to the remainder of his effects, real and personal, in order that they might pass to his heirs-at-law subject to the life-estate devised to his wife; but such intention is not to be presumed if any other construction be possible, especially where a devise like this is of the testator's entire estate. 2 Preston on Estates, 103. Where the devise is general, with words added implying a power of disposition, the devisee takes a fee.

Where an express estate for life is given with such words of power added, the devisee takes an estate for life, and the power must be exercised. 2 Preston on Estates, 81, 82; Cruise, tit. Devise, c. 13, sect. 5; *Jackson* v. *Robins*, 16 Johns. 537; *Stevens* v. *Winship*, 1 Pick. 318; *Reid* v. *Shergold*, 10 Ves. 370; *Guthrie* v. *Guthrie*, 1 Call, 7; *Shermer* v. *Shermer's Ex'r*, 1 Wash. 266; *Burwell* v. *Anderson*, 3 Leigh, 355; 2 Johns. 392; *May* v. *Joynes*, 20 Gratt. 692. The power is a distinct gift, and is not limited to a disposition of the life-interest, but will pass the fee. 3 Lomax, Dig. 317; 2 Preston, 81, 82; 8 Viner's Abr. 234, 235, sects. 2, 3, 4, 9, 8, 14. Nor is any special form of words necessary to give the power of disposition of the fee to the life-tenant.

The current of authority is unbroken, that words of power following a gift for life, and uncontrolled by other parts of the will, give either a fee, or a life-estate with power to dispose of the fee. Mrs. Sinclair's deed, therefore, either conveyed, and was meant to convey, nothing, or was intended to operate according to the legal effect of its words upon the reversion.

MR. JUSTICE FIELD stated the case, and delivered the opinion of the court.

The disposition of the case depends upon the construction

given to the devise of Robert Sinclair to his widow, and the operation of the foreclosure proceedings as an estoppel upon the complainant from asserting title to the property.

The complainant contends that the widow took a life-estate in the property, with only such power as a life-tenant can have, and that her conveyance, therefore, carried no greater interest to the Union Potomac Company. The defendant corporation, on the other hand, insists, that, with the life-estate, the widow took full power to dispose of the property absolutely, and that her conveyance accordingly passed the fee.

We are of opinion that the position taken by the complainant is the correct one. The interest conveyed by the devise to the widow was only a life-estate. The language used admits of no other conclusion; and the accompanying words, "to do with as she sees proper before her death," only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and, perhaps, without liability for waste committed. These words, used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected.

In the case of *Bradley* v. *Westcott*, reported in the 13th of Vesey, the testator gave all his personal estate to his wife for her sole use for life, to be at her full, free, and absolute disposal and disposition during life; and the court held, that, as the testator had given in express terms an interest for life, the ambiguous words afterwards thrown in could not extend that interest to the absolute property. "I must construe," said the Master of the Rolls, "the subsequent words with reference to the express interest for life previously given, that she is to have as full, free, and absolute disposition as a tenant for life can have."

In *Smith* v. *Bell*, reported in the 6th of Peters, the testator gave all his personal estate, after certain payments, to his wife, "to and for her own use and disposal absolutely," with a provision that the remainder after her decease should go to his son. The court held that the latter clause qualified the former,

and showed that the wife only took a life-estate. In construing the language of the devise, Chief Justice Marshall, after observing that the operation of the words "to and for her own use and benefit and disposal absolutely," annexed to the bequest, standing alone, could not be questioned, said, "But suppose the testator had added the words 'during her natural life,' these words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their character qualified by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make."

The Chief Justice then proceeded to show that other equivalent words might be used, equally manifesting the intent of the testator to restrain the estate of the wife to her life, and that the words, "devising a remainder to the son," were thus equivalent.

In *Boyd* v. *Strahan*, 36 Ill. 355, there was a bequest to the wife of all the personal property of the testator not otherwise disposed of, "to be at her own disposal, and for her own proper use and benefit during her natural life;" and the court held that the words "during her natural life" so qualified the power of disposal, as to make it mean such disposal as a tenant for life could make.

Numerous other cases to the same purport might be cited. They all show, that where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended.

The position that the complainant is estopped, by the proceedings for the foreclosure of the mortgage, from asserting title to the property, has less plausibility than the one already considered. There was nothing in the fact that the complainant and Hector Sinclair owned seven-eighths of the reversion, which prevented them from taking a mortgage upon the life-estate, or

purchasing one already executed. There was no misrepresentation of the character of the title, which they sought to subject to sale by the foreclosure suit. The bill of complaint in the suit referred to the deed from the widow to the Union Potomac Company, and to the mortgage executed to secure the consideration; and copies were annexed. The deed described the property sold as the tract conveyed to the widow by the last will and testament of her late husband. The mortgage described the property as the tract of land conveyed on the same day to the mortgagor. The decree ordering the sale described the property as "the lands in the bill and proceedings mentioned." The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of *caveat emptor* applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed. And here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterwards. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title, inconsistent with the fact; but, on the contrary, it is abundantly established by the evidence in the record, that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned, and had sold to that company, a life-interest in the property, and that they had acquired the interest of the heirs.

It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud.

And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story's Eq. 391. To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania, that "the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." *Hill* v. *Eppley*, 31 Penn. St. 334; *Henshaw* v. *Bissell*, 18 Wall. 271; *Biddle Boggs* v. *Merced Mining Company*, 14 Cal. 368; *Davis* v. *Davis*, 26 id. 23; *Commonwealth* v. *Moltz*, 10 Barr, 531; *Copeland* v. *Copeland*, 28 Me. 539; *Delaplaine* v. *Hitchcock*, 6 Hill, 616; *Havis* v. *Marchant*, 1 Curt. C. C. 136; *Zuchtmann* v. *Robert*, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as, where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits. But such cases are generally referable to other principles than that of equitable estoppel, although the same result is produced; thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of

ratification or election. Be this as it may, the general ground of the application of the principle of equitable estoppel is as we have stated.

It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Crest* v. *Jack*, 3 Watts, 240; *Knouff* v. *Thompson*, 4 Harris, 361.

Tested by these views, the defence of estoppel set up in this case entirely fails.

The decree of the Circuit Court must be reversed and the cause remanded for further proceedings in accordance with this opinion; and it is so *Ordered.*

MR. JUSTICE SWAYNE and MR. JUSTICE DAVIS dissented.

THE "JUNIATA."

1. The doctrine announced in *The Atlas*, *supra*, p. 302, that where an innocent party suffers damages by a collision resulting from the mutual fault of two vessels, only one of which is libelled, the decree should be against such vessel for the whole amount of the damages, and not for a moiety thereof, reaffirmed, and applied to this case.
2. This court will not, in a case of collision, reverse the concurrent decrees of the courts below, upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower courts have committed an error, and that a wrong has been done to the appellant.

APPEALS from the Circuit Court of the United States for the District of Louisiana.

Argued by *Mr. Assistant Attorney-General Smith* and *Mr. Thomas J. Durant* for the libellants, and by *Mr. Morton P. Henry* for the claimants.

MR. JUSTICE SWAYNE delivered the opinion of the court.

These are cross-appeals in admiralty from the decree of the Circuit Court of the United States for the District of Louisiana. Separate libels were filed in the District Court by Pursglove, and by the United States, against the mail-steamer "Juniata." The libel of Pursglove alleged a collision between his steam-tug "Neafie" and the "Juniata," upon the Mississippi River, below New Orleans; that the steamer was wholly in fault; that the tug was damaged; and that he himself sustained severe and lasting bodily injuries. The libel of the United States alleged the same collision, without fault upon the part of the "Neafie;" and, further, that at the time of the collision the "Neafie" was towing a flat-boat containing a cargo of five hundred barrels of cement, both belonging to the United States, and that, without fault on the part of the flat-boat, it also collided with the steamship, and that both boat and cargo were sunk and wholly lost. Both libels sought to recover damages. The District Court held that both the steamship and the tug were in fault, and that the damages should be divided; and thereupon it was decreed that the steamship should pay the sum of $10,000 to Pursglove, and $1,263.75 to the United States, for half the damages found to have been sustained by those parties respectively.

The cases were removed to the Circuit Court by appeal. That court affirmed the decree of the District Court. All the parties thereupon appealed to this court. There is no question of law involved in the controversy which has not already been so settled by this court that it is no longer open to doubt or debate. The contest turns wholly upon the facts. The counsel for the "Juniata" say in their brief: "The conflict of testimony in these cases is, we believe, without a parallel. Certainly, in our long practice, we have never met with a case presenting so great a conflict in the testimony." These remarks are well warranted by the record. There is no single fact alleged by either party injuriously affecting the other in relation to which the antagonisms in the evidence are not as direct and absolute as is possible. As usual, the witnesses on each side vindicate their own vessel, and throw the entire fault upon the other vessel. Even the place of the collision — whether on the east or west side of

the river — is wrapped in the darkness arising from this conflict. It is impossible to harmonize these discrepancies, and well-nigh impossible to say where, upon any given point, the greater weight of testimony lies. We are without the means of applying intelligently the aphorism of the Roman lawyers, that "witnesses are to be weighed, and not counted." Analysis and argument, however searching, are of little avail. But, amid this conflict and confusion of the testimony, we think we can see our way to the conclusion that both vessels were in fault. The findings of the court below are also persuasive to this result. Upon the subject of such concurrent decisions, this court, in *The Grace Girdler*, 7 Wall. 204, said, "The District Court acquitted the schooner and dismissed the libel. The libellants appealed to the Circuit Court. The court affirmed the decree. The case is now here by a second appeal. This court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower courts have committed an error, and that a wrong has been done to the appellants." This is not a case of that character. *Walsh* v. *Rogers*, 13 How. 284; *The Marcellus*, 1 Black, 414; *The Water Witch*, id. 494; *The Grafton*, 1 Blatch. 173; *The Narragansett*, id. 211; *Cushman* v. *Ryan*, 1 Story, 95; *Bearse* v. *Pigs, &c.*, id. 322; *Tracy* v. *Sacket*, 1 Ohio St. 54.

As the case is presented, the principle thus announced may well be permitted to control the result as between the tug and the steamship.

We cannot say, as to either of them, that the courts below clearly committed an error, and that a wrong has been done. Such a proposition, to say the least, is not sustained by a preponderance of evidence. Upon this ground mainly we rest our judgment.

It could serve no useful purpose in this or any other case to enter upon an extended examination of the subject, and we forbear to do so.

The fact of fault on both sides being established, an apportionment of the damages necessarily followed. The amount awarded to Pursglove, in this view of the case, is assailed as being excessively large. We do not so regard it. He was

struck down in the noon of life and made a paralytic, with little or no hope, according to the medical testimony, of amendment in the future. For such an injury the amount decreed was certainly none too large.

The branch of the case relative to the United States is upon a different footing. Their flat-boat is neither alleged nor proved to have been in any wise in fault. The principle of apportionment has, therefore, no application to them. Their boat not being inculpated, they are entitled to full damages. The decree of the Circuit Court is erroneous in not giving it to them.

We should adjudge that half the amount should be paid by the tug, and the other half by the steamer, but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offence being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damages. *The Atlas*, *supra*, p. 302. The decree must, therefore, be changed, so as to require full payment to be made to the United States by the claimants of the "Juniata." Whatever their rights may be as against Pursglove, by reason of such payment of more than one-half, must be settled in another proceeding. It cannot be done in this litigation.

The case will be remanded to the Circuit Court, with directions to modify the decree in the particular mentioned, in conformity to the opinion of this court, and, when thus modified, to proceed to execute it. In all other respects the decree of the Circuit Court is affirmed. The costs will be equally divided between Pursglove and the claimants of the steamer.

SMITH ET AL. v. GAINES.

1. Under the laws of Louisiana, sureties in an appeal-bond, which operates as a *supersedeas*, are liable, by a summary proceeding, to judgment, after execution on the original judgment has been issued, and a return of *nulla bona* made by the proper officer.
2. The officer who made this return cannot be compelled to amend or modify it, nor can its truth be questioned in the subsequent proceeding against the sureties.
3. It is no defence that the defendant in the original judgment has been garnished, or the judgment sold, at the instance of creditors of the plaintiff, where the sureties have not been made parties to the proceedings to appropriate such judgment.

ERROR to the Circuit Court of the United States for the District of Louisiana.

Submitted on printed argument by *Mr. James McConnell* for the plaintiffs in error.

Argued by *Mr. James Emott* for the defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

Mrs. Gaines, the defendant in error, having recovered a decree against the City of New Orleans for the sum of $125,266.79, in the Circuit Court of the United States for the District of Louisiana, the city took an appeal to this court; and, for the purpose of superseding the execution of the decree, the plaintiffs in error gave the bond which is the foundation of the present suit. The decree was affirmed; and, on return of the mandate, an execution was issued against the city for the amount of the decree and costs, which was placed in the hands of the marshal. That officer made return on this execution that he had not been able to find any property of the city subject to the writ, and that though he had called on the proper officers of the city, and on the counsel of Mrs. Gaines, neither of them had pointed out to him such property. On this return the counsel of Mrs. Gaines, pursuing the practice prescribed by the laws of Louisiana in such cases, procured from the Circuit Court a rule on the sureties in the *supersedeas* bond, to show cause why judgment should not be entered against them on their undertaking, and execution issue thereon for the amount of the decree and all necessary costs.

To this rule the defendants set up two answers, to wit: —

1. That the return of the marshal was false, and that there was property of the city liable to the execution which had been shown the marshal, sufficient to pay the same.

2. That, by proceedings of certain creditors of Mrs. Gaines, in the State courts of Louisiana, by way of garnishee and otherwise, the judgment had been sold and was held by the parties, and her right to the money due from the city seized and held for the benefit of those creditors.

In aid of the first defence, and while the case was pending, the sureties obtained a rule on the marshal to show cause why he should not amend his return in the matter in which they alleged it to be false.

To this rule the marshal answered, that the return was made on his official responsibility; that the same was true and sufficient, and he did not desire to change it. This rule came on to be heard with the rule for judgment against the sureties, and the court dismissed it. On this hearing the sureties offered evidence tending to show that there was property liable to execution belonging to the city, which evidence was rejected, and an exception was taken to the ruling of the court. This evidence was offered on both issues; namely, that regarding the amendment of the marshal's return, and that regarding the liability of the sureties on the bond. This ruling of the court is the first error assigned here.

We are of opinion that the action of the court was correct.

At common law, the sureties on the bond would be liable to a suit without issuing an execution against the principal. The fact that the judgment appealed from was affirmed and was unpaid would be sufficient. Their undertaking is to pay in that event, and they must do it. But the Code of Practice of Louisiana of 1870, sect. 596, says: —

"If, on the execution of the judgment of the Appellate Court, there is not sufficient property of the appellant to satisfy the judgment and costs, the appellee may obtain judgment against the surety given by the appellant: *Provided*, that no suit shall be instituted against such surety until *the necessary steps* have been taken to enforce payment against the principal."

How the want of sufficient property of the appellant is to be shown, and what are "the necessary steps to enforce payment against the principal," are shown by sect. 570 of the Revised Statutes of the same year, which is as follows: —

"In all cases of appeal to the Supreme Court, or other tribunal in this State, if the judgment appealed from be affirmed, the plaintiff may, on the return of the execution that no property has been found, obtain a decree against the surety on the appeal-bond for the amount of the judgment, on motion, after ten days' notice; which motion shall be tried summarily, and without the intervention of a jury."

It is a fair inference from these two provisions that the issue of an execution and the return on it of the proper officer of *nulla bona* is what is required, and all that is required, to render perfect the obligation of the sureties to pay. This seems to have been the view of the Louisiana courts also, under the code formerly in existence, with similar provisions to those we have quoted. *Allen* v. *Hawthorne*, 1 La. Ann. 123; *Rawlings* v. *Barham*, 12 id. 630; *Walls* v. *Roach*, 10 id. 543.

As regards the effort to compel the marshal to amend his return, we think his answer contains a reply which is conclusive. In making that return, he acts under a heavy official responsibility. If false, he is liable to plaintiff and to defendant for any damages resulting from it. He must, therefore, be at liberty to make his own return, subject to that responsibility. Nor do we think his return can be questioned by the sureties. It is declared by the law to be the appropriate evidence of the right to proceed against them. It is an official act. If they had desired him to exercise it otherwise than he did, they might, by showing him property, have possibly rendered him liable for a false return, and, by paying the debt, avail themselves of this liability. But we do not think that either the spirit of the statute or the justice of the case permits an inquiry into the truth of the officer's return in the subsequent proceeding against the sureties. It is analogous to the return of *nulla bona* as the foundation of a creditor's bill in chancery, which cannot be questioned. There was, therefore, no error in rejecting this evidence and in holding the defence founded on it insufficient.

As to the objection that Mrs. Gaines's interest in the judgment had been attached, assigned, and sold, that is nothing to these defendants. Until the judgment is paid or satisfied, they are liable. Until they are garnished or enjoined, they have no defence. The equitable owners of the judgment have a right to use Mrs. Gaines's name as the judgment plaintiff to procure judgment against the sureties, and probably are pursuing this remedy. If, after judgment, when their liability is decided, or if they admit it and are ready to pay, they can easily protect themselves by a bill of interpleader, by payment into court, or by some other appropriate remedy; but, while contesting their liability to anybody on the bond, they have no right to interfere among those who are claiming the benefit of the judgment, — a judgment which is not against them, and the liability to pay which they deny.

When that disputed liability is affirmed, the court will, if requested, find means to protect them from paying it more than once. *Judgment affirmed.*

COCKLE ET AL. v. FLACK ET AL.

1. Where a commission-merchant, in Baltimore, advanced to a pork-packer, in Peoria, $100,000, for which he was to receive interest at the rate of ten per cent per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission-merchant or not, it was properly left to the jury to decide on all the facts whether or not the commissions were a cover for usury, or were an honest contract for commission business, in connection with use of money.
2. The express agreement of ten per cent is not usurious, because lawful in Illinois, though not so in Maryland. *Andrews* v. *Pond*, 13 Pet. 65, reaffirmed.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Robert G. Ingersoll for the plaintiffs in error.

Mr. S. T. Wallis, contra.

MR. JUSTICE MILLER delivered the opinion of the court.

Plaintiffs in error were engaged in the business of packing pork in Peoria, Ill., and the defendants were commission-merchants at Baltimore, in the fall of 1872, when the contract was

made which is the foundation of this suit. There had been transactions between the parties the previous year in the line of their business, and, with reference to the packing business of the approaching season, this agreement was made by letter. The substance of it is, that defendants should advance to plaintiffs, as it was needed, the sum of $100,000, which they were to invest in the hog product, at the rate of eighty per cent of the money so advanced, and twenty per cent of the money put into the purchase by plaintiffs. Defendants were to have interest on the money advanced at the rate of ten per cent per annum. The product was to be shipped to them for sale, and they were to have two and a half per cent commission on the amount, if sold within sixty days, and one per cent commission for every thirty days it was carried thereafter. The contract gave to plaintiffs the right to sell for themselves, without sending to defendants, but the latter were to have their commissions all the same.

When the product had all been sold out and an account rendered, a balance was found to be due defendants, for which they brought this suit, and recovered a judgment of $7,054.48.

It appears by the bill of exceptions that this balance was mainly if not wholly made up of the commissions charged on sales *not* made by defendants, of products which never came to their possession; and the recovery was resisted on the sole ground that these commissions were a device to cover usurious interest.

The charge of the court to the jury on this point was to the effect that the transaction was not necessarily usurious; that defendants, being engaged in the commission business, which required the use of money, might loan their money at lawful rates of interest to such parties and on such terms that it would bring to them also the business which would grow out of the investment of it; that, if the contract was made only with the honest purpose of securing, in addition to interest, the profits incidental to handling the product as commission-merchants, it was not usurious; that, on the other hand, such a contract might be used as a mere evasive device to cover usurious interest, and it left it to the jury to say from all the circumstances whether this were so.

There can be no question, that, on the general doctrine as to the line which marks the division between an honest transaction and a usurious cover, the charge of the court was correct; and that it is in this class of cases the province of the jury, in jury trials, and of the chancellor, in suits in equity, to determine, on a full consideration of all the facts, whether it be the one or the other.

But counsel for plaintiffs argue, that as to these commissions, which defendants never earned by sale of the property or by handling it, and as to which they were put to no cost or inconvenience, there can be no other consideration but the use of the money, and they are necessarily usurious.

It must be confessed that the argument has much force. But we are of opinion that it is not so conclusive that the court ought to have held as matter of law that it was usury.

It is to be considered that defendants were engaged in a business which was legitimate, and in which both custom and sound principle authorized the joint use of their money and their personal service, increased in value by their character for integrity and experience. To both these sources they looked for their profits, and they were necessarily united.

It was a necessity of their trade, and it was lawful for them, while loaning their money at a specified rate of interest, to stipulate with the parties to whom it was loaned for the incidental advantages of acting as commission-merchants for the sale of the property in which the money was to be invested by the borrower. They had the right also to require, as a condition of the loan, that it should be invested in such property as would require their services in selling and handling it. All this is admitted.

We see no reason why the parties could not go a step further, and stipulate, that if for any reason operating in the interest of the borrower he should prefer to become his own broker or commission-merchant, or to sell at home, he should pay the commission which the other had a right to contract for and receive. Like the port pilot, and other instances, they were ready and willing to perform. They had a place of business, clerks, and their own time and skill ready to devote to the plaintiffs' business. In that business they had a large pecuniary

interest. They had loaned their money without requiring any other security than the obligation of the other party, except that which might arise from the property coming to their hands. To make this property a sufficient security, the contract required of the plaintiffs that they should invest in the same property twenty dollars of their own money to every eighty dollars borrowed of defendants. The relinquishment of this right to control the sale of the property was a good consideration for the commissions which they would have made if they had sold it.

While it was possible to make such a transaction a mere cover for usury, it was at the same time possible that the contract was a fair one, in aid of defendants' business, — a business in which they were actually and largely engaged, and in which lending money was the mere incident and not the main pursuit.

It was, therefore, properly left to the jury to say whether, under all the circumstances, it was or was not a usurious transaction, under instruction to which we can see no objection.

We do not think the express reservation of ten per cent interest makes the contract usurious because the law of Maryland forbids more than six. The contract was quite as much an Illinois contract, where ten per cent is lawful, as a Maryland contract, and the former is the law of the forum. The ruling of the court below was in accord with what this court had held in *Andrews* v. *Pond*, 13 Pet. 65. *Judgment affirmed.*

WISWALL ET AL. *v.* CAMPBELL ET AL., ASSIGNEES.

This court has no jurisdiction to review a judgment of the Circuit Court, rendered in a proceeding upon an appeal from an order of the District Court, rejecting the claim of a supposed creditor against the estate of a bankrupt.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Lawrence Proudfoot in support of the motion.

Mr. John H. Thompson in opposition thereto.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This writ of error brings here a record of the Circuit Court

for the Northern District of Illinois, in a proceeding upon an appeal taken under sect. 4984, Rev. Stat., from an order of the District Court rejecting a claim presented by a supposed creditor against the estate of a bankrupt. A motion is now made to dismiss, upon the ground that judgments of the circuit courts in such cases are not reviewable here upon error.

By sect. 691, Rev. Stat., "all final judgments of any circuit court . . . in civil actions, brought there by original process, or . . . removed there from any district court by appeal or writ of error, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000 [now $5,000], may be re-examined, and reversed or affirmed in the Supreme Court upon a writ of error."

If we have jurisdiction of this case, it is by virtue of this statute.

The cases are numerous in which it has been decided that we cannot review the action of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. *Morgan* v. *Thornhill*, 11 Wall. 74; *Hall* v. *Allen*, 12 id. 454; *Mead* v. *Thompson*, 15 id. 638; *Marshall* v. *Knox*, 16 id. 555; *Coit* v. *Robinson*, 19 id. 274; *Stickney* v. *Wilt*, 23 id. 150; *Sandusky* v. *National Bank*, id. 293. The principle upon which these decisions rests is, that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings.

The circuit and district courts have concurrent jurisdiction of "all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bankrupt transferable to or vested in such assignee" (Rev. Stat. sect. 4979); but such suits, when prosecuted, are no part of the bankruptcy proceeding. They are in

aid of such a proceeding, but, while progressing, are entirely separate from and independent of it. They are used by the bankrupt court to settle the rights of parties who are not subject to its jurisdiction in the suit in bankruptcy, and who, therefore, cannot be affected by any judgment or decree that may be made in that cause. Appeals and writs of error to this court in such suits are allowed, and these are the appeals and writs of error referred to in sect. 4989.

The question, then, to be determined in this case is, whether proceedings by creditors to prove their demands against the estate of a bankrupt are part of the suit in bankruptcy, or separate and independent suits at law or in equity.

To entitle a creditor to have his demand allowed, he must verify it in the manner provided by sect. 5077; and, when so verified, it must be delivered to the register having charge of the case. Sect. 5079. If the proof is satisfactory to the register, he is required to deliver it to the assignee, who must examine and compare it with the books and accounts of the bankrupt. It is the duty of the assignee, also, to register, in a book to be kept by him for that purpose, the names of the creditors who have proved their claims, in the order in which the proof is received, stating the time of the receipt of the proof, and the nature and amount of the debts. This book is open to the inspection of all creditors. Sect. 5080. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or when the proof shows the claim to be founded in fraud, illegality, or mistake. Sect. 5081. The court must allow all debts duly proved, and cause a list thereof to be made and certified to one of the registers. Sect. 5085.

So far, clearly a proceeding to prove a debt is part of the suit in bankruptcy. It has none of the qualities of an independent suit at law or in equity. By sect. 4980, any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the

decision of the District Court to the Circuit Court of the same district. Such appeal (sect. 4982) must be entered at the term of the Circuit Court which shall be held within the district next after the expiration of ten days from the time of claiming the same, and, on entering it (sect. 4984), the supposed creditor must file in the clerk's office of the Circuit Court "a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in the like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted in the usual manner in the courts of the United States, except that no execution shall be awarded against the assignee." The final judgment of the Circuit Court rendered upon the appeal is, by sect. 4985, made conclusive, and the list of debts must, if necessary, be altered to conform thereto. Even under the operation of these provisions of the statute the proceeding originally commenced as part of the bankruptcy suit is not, as we think, separated from it, and converted into a suit at law. The form of the proceeding in the Appellate Court must conform to that of a suit at law; but that does not make the proceeding itself such a suit, any more than a proceeding in the Circuit Court under its supervisory jurisdiction is a suit in equity, because, by sect. 4986, it is provided that it shall be heard and determined "as in a court of equity."

Congress, in enacting the bankrupt law, had apparently in view, (1) the discharge, under some circumstances, of an honest debtor from legal liability for debts he could not pay; and (2) an early *pro rata* distribution, according to equity, of his available assets among his several creditors. Prompt action is everywhere required by law. In *Bailey* v. *Glover*, 21 Wall. 346, we said, speaking through Mr. Justice Miller, that "it is obviously one of the purposes of the bankrupt law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary

delay." The list of debts "entitled to share in the bankrupt's property" (sect. 5091) is an important element in the settlement of the estate. Without it there can be no dividend. Hence the necessity for as "quick and summary" a disposal of the questions arising under this part of the case as is consistent with a reasonable protection of the rights of the parties in interest. Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences. His remedies for the purpose of this proof are prescribed by the law. As has been seen, he must first submit his case to the register. It is then examined by the assignee, who must record it in a book open to the inspection of creditors. An opportunity is then given to parties in interest to call upon the District Court to take further testimony, and pass upon the claim. That court must then decide, and from its decision an appeal may be taken to the Circuit Court, where further litigation may be had; but when that court acts, all parties are concluded. The judgment of that tribunal is final. From it no appeal lies. There is no more hardship in this than in holding that the action of the Circuit Court, under the supervisory jurisdiction provided for in sect. 4986, is conclusive, and not subject to re-examination here.

This is in accordance with the views expressed by Mr. Justice Clifford, when he delivered the opinion of the court in *Morgan* v. *Thornhill*, 11 Wall. 65. As, however, the question was not then directly presented for adjudication, the same learned justice subsequently saw fit, in *Coit* v. *Robinson*, 19 Wall. 284, to leave it open for further consideration. Now, however, when the question is fairly presented, and after it has been fully argued, we are clearly of the opinion that what was thus said in *Morgan* v. *Thornhill* was correct, and that we have no jurisdiction upon error in this class of cases.

Dismissed for want of jurisdiction.

COWDREY ET AL. v. GALVESTON, HOUSTON, AND HENDERSON RAILROAD COMPANY ET AL.

1. A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.
2. The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation, and with damages done to property during his management.
3. Where an attorney and counsellor-at-law, employed by trustees of certain mortgaged property to foreclose the mortgages, upon a stipulated retaining fee, entered upon such retainer, commenced the suit, prosecuted it until prevented by the outbreak of the civil war, and, after the termination of the war, offered to go on with the suit; but in the mean time, the trustees having died, a new suit was commenced and prosecuted, without his assistance, by the bondholders (for whose security the mortgages were executed), to foreclose the same mortgages, in which suit a receiver was appointed,— *Held*, that his claim for his fee was chargeable against the funds obtained by the receiver from the mortgaged property.

APPEAL from the Circuit Court of the United States for the Eastern District of Texas.

Submitted on printed arguments by *Mr. W. P. Ballinger* for the appellants, and by *Mr. R. T. Merrick* for the appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

In February, 1867, a suit was commenced in the Circuit Court of the United States for the Eastern District of Texas, for the foreclosure of certain mortgages executed by the Galveston, Houston, and Henderson Railroad Company, a corporation created by the legislature of Texas, and the sale of the mortgaged property. The mortgages were adjudged valid by the court, and a sale of the mortgaged property was decreed. Subsequently, in 1869, by consent of the parties, Cowdrey, one of the complainants, was authorized to take the charge and management of the property, and act as receiver of the court. He accordingly qualified, and for some years acted as such receiver, superintending the management of the road of the

company until it was sold, and disposing, under direction of the court, of its earnings, and of the proceeds received when the sale was made. Reports of his proceedings were rendered from time to time to the court, and received its approval. His final report was filed in 1874, showing a balance of assets in his hands of $6,963.99; and the direction of the court as to its disposition was prayed. Exceptions to the allowance of the account being taken, the matter was referred to a master for his examination and report. The master refused to allow a credit for certain expenditures, incurred to defeat a subsidy from the city of Galveston to aid the construction of a road parallel with the one in the hands of the receiver. These expenditures amounted to $14,029.15, and this sum being added to the amount of the assets admitted to be in his hands, the receiver was charged with $20,993.14.

The master allowed certain sums against the company for goods lost in transportation, and damage done to property whilst the road was under the management of the receiver, amounting to $7,565.

The master also allowed a claim of John C. Bullitt, Esq., for professional services to the trustees in a previous attempt to foreclose the mortgages, the complete execution of which was prevented by the war. The claim was for $5,000, but the court in its decree reduced the amount to $2,500. The report of the master, modified as to this amount, was confirmed, and, by the decree of the court, the receiver was directed to pay the several amounts allowed, besides certain costs incurred, out of the proceeds in his hands, in preference to the balance due the complainants. From this decree the appeal is to this court.

The expenditures to defeat the subsidy proposed from the city of Galveston were properly disallowed. It was no part of the receiver's duty to interfere with the construction of a parallel line of railway, or to attempt to defeat any contemplated aid for such an enterprise. The proposed line may have been of great importance to the public and necessary to the prosperity of the city, though it might possibly diminish the future earnings of the company whose road was in his charge. At any rate, as an officer of the court, the receiver could not be allowed to determine the question of its importance, either to

the public or the company, and, acting upon such determination, to appropriate funds in his custody to aid or defeat the measure, without sanctioning a principle which would open the door to all sorts of abuses. A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment.

The allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid.

The claim of the intervenor, Mr. Bullitt, for his professional services as an attorney and counsellor-at-law, was a meritorious one. He had been retained, in 1860, by the trustees to foreclose the first and second mortgages embraced in this suit, and was promised by them a retaining fee of $5,000. Upon his engagement he went from Philadelphia, the place of his residence, to Galveston, in the State of Texas, and there filed a bill in the Circuit Court of the United States to foreclose the mortgages, one of which was for $1,500,000, and the other for $750,000. Process was issued and served, and issue was taken in the suit by a demurrer to the bill. The further prosecution of the suit was prevented by the outbreak of the civil war, during which the records of the court were destroyed by fire, and the trustees died. Upon the close of the war, the intervenor took steps to continue the suit; and, while he was engaged in correspondence with the representatives of the trustees on the subject, the present suit was brought by Cowdrey and others, bondholders, without consultation with him, and without his assistance. Under these circumstances, there can be no reasonable doubt of the justice of the claim, or that it was properly allowed by the master. Of its subsequent reduction to one-half he does not complain, not having excepted to the decree in this particular, or appealed from it to this court.

The fact that the retainer was by the trustees in the mortgages, who have since died, and that the present suit was prosecuted by the bondholders, the *cestuis que trust*, does not affect the position of the claim. The trustees, had they lived, would have been entitled to retain out of the funds received by them sufficient to meet the claim. They would have had an equitable right not merely to be reimbursed from such funds all reasonable expenses incurred, but also to retain from the funds sufficient to meet all reasonable liability contracted in the execution of their trust. From the time of the employment of the intervenor, the funds derived from the mortgaged property were chargeable with the liability consequent upon the retainer; and it matters not whether those funds were obtained by the trustees, or, in consequence of their death or of the action of the court, by other parties having charge of the property.

Decree affirmed.

NORTON, ASSIGNEE, v. SWITZER.

1. A suit pending against a party at the time he is adjudged a bankrupt, may, after due notice to his assignee, be prosecuted to final judgment against the latter in his representative capacity, where he makes no objection to the jurisdiction and the bankrupt court does not arrest the proceedings.
2. Such judgment may be filed with the assignee as an ascertainment of the amount due to the creditor by the bankrupt, and as a basis of dividends, but it is effectual and operative for that purpose *only*.

ERROR to the Supreme Court of the State of Louisiana.

Switzer brought suit against Mary Hein and John Hein in the Second Judicial District Court for the parish of Jefferson, which, by consent of parties, was transferred to the Fifth District Court of the parish of Orleans. During its pendency, he suggested that since the institution thereof the defendants had taken the benefit of the bankrupt law, and that Emory E. Norton had been appointed and qualified as their assignee. The court ordered that the latter, in his capacity as such assignee, be made a party to the suit in their place and stead. Process was personally served upon him; but he failed to appear. The cause coming on for trial, judgment was rendered in favor of

Switzer against Norton, said assignee. The latter appealed to the Supreme Court of the State; and the judgment having been there affirmed, he sued out this writ of error.

Submitted on printed arguments by *Mr. E. T. Merrick* and *Mr. G. W. Race* for the plaintiff in error, who, upon the question as to whether an assignee in bankruptcy can, after citation in a pending suit, be substituted by a State court as a defendant in the place and stead of the bankrupt, referred to *In re Cook and Gleason*, 3 Biss. 119; *In re Ernest Sacchi*, 10 Blatchf. 29; *In re Geo. W. Anderson*, 9 Bank. Reg. 360.

No counsel appeared for the defendant in error.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practised in the admiralty courts.

Causes of action which give rise to a maritime lien, whether contracts or torts, may be prosecuted in other modes of proceeding as well as *in rem* in the admiralty.

Wherever a maritime lien arises, the libellant or plaintiff may waive the lien in the admiralty, and pursue his remedy by a suit *in personam*, or he may institute an action at law, if the common law is competent to give him a remedy. Such a party may, if he sees fit, proceed *in rem* in the admiralty; and, if he elects to enforce the maritime lien which arises in the case, he cannot proceed in any other mode or forum, as the jurisdiction of the admiralty courts to enforce a maritime lien is exclusive, and cannot be exercised in any other mode than by a proceeding *in rem*.

Parties in maritime cases are not restricted to that mode of proceeding, even in the admiralty, as they may waive the lien and proceed *in personam* against the owner or master of the vessel, in the same jurisdiction; nor are they compelled to proceed in the admiralty at all, as they may resort to their common-law remedy in the State courts, or in the Circuit Court, if the party seeking redress and the other party are citizens of different States. *Leon* v. *Galceran*, 11 Wall. 190.

Sufficient appears to show that the plaintiff sued John and

Mary Hein as owners of the steamboat "Frolic," in an action of assumpsit, and that he alleged in his petition that they were indebted to him in the sum of $870 with interest, for services rendered as master and superintendent in repairing the vessel, at the rate of $300 per month, for the period specified in the bill of particulars annexed to the petition. He also alleged that he was a privileged creditor, that the steamboat was about to leave the jurisdiction, and that he was apprehensive he should lose his claim if she should depart before it was satisfied; wherefore he prayed for a writ of provisional seizure, and for process to compel the appearance of the defendants.

Summonses were issued and served; and the defendants appeared and filed a plea to the jurisdiction of the court, in which they alleged that the suit is not a proceeding *in rem*, but a proceeding against the persons of the defendants, and that they reside outside of the jurisdiction of the court. They also filed an exception, that the plaintiff cannot proceed by provisional seizure, because the services for which he claims payment did not arise while the steamboat was navigating or trading within the State.

Pursuant to the order of the court, the steamboat was surrendered to the defendants, and they gave the usual bond for value; and the cause, by the consent of the parties, was transferred from the second to the fifth judicial district, where the residue of the proceedings took place.

Four days later the defendants appeared and filed an answer, in which they denied all the allegations of the petition; that John Hein was ever owner of the steamboat; that the plaintiff has any privilege on the steamboat for any work or services, or that he ever rendered services as charged; and prayed judgment in their favor.

On the same day the court granted a rule that the plaintiff show cause on a day named why the provisional seizure issued in the case should not be set aside. Reasons were also assigned by the defendants in support of the motion; but the plaintiff, before the return-day of the rule, amended his petition, and alleged that he omitted to state in his original petition that John Hein, the agent and manager of the steamboat, gave him a note for the sum of $870, as an acknowledgment for the ser-

vices charged in the bill of particulars; and he prayed leave to file the note and the amended petition, and that the defendants might be cited to appear and answer.

Leave to file the petition and note was granted; and they were filed, as appears by the record. New summonses were issued to the defendants; and they appeared and filed an exception to the supplemental petition, because the same alters the demand, showing that the claim as stated in the original petition has been novated by the taking of a note. Hearing was had, and the exception was dismissed; and it also appears that the rule to show cause why the provisional seizure should not be set aside was also dismissed, by consent of the parties.

Separate answers were then filed by the defendants, as follows: The defendant first named denies that he was or is the owner of the steamboat, and says that the note was given as a novation of the prior debt, and was accepted by the plaintiff. Mary Hein also denies that she is indebted as charged, or that the note was given as evidence of the debt; but avers that it was given by John Hein as a novation and in payment of the original debt, as acknowledged by the plaintiff. Subsequently she pleaded payment of the sum of $400, as per receipt exhibited in the record.

Testimony was taken; and the defendants subsequently pleaded as a peremptory exception that the suit is against a steamboat, and that the District Court, sitting in admiralty, has exclusive jurisdiction of such cases. Both parties were heard, and the court sustained the exception. Due application was made by the plaintiff for a new trial; and, pending that motion, the plaintiff suggested to the court that the defendants had severally taken the benefit of the Bankrupt Act, and that Emory E. Norton had been appointed and qualified as their assignee; whereupon the court ordered that the assignee of the defendants be made a party to the suit, *in his capacity aforesaid*, in place and stead of the defendants. Regular process was accordingly issued and served in person upon the assignee.

Two continuances followed, and the cause subsequently came on for trial. Evidence was introduced by the plaintiff; and the court, on the 22d of April, 1870, rendered judgment in his favor, that he recover of Emory E. Norton, assignee of the

defendants John and Mary Hein, the sum of $870, with interest until paid, and with costs and privilege on the steamboat.

Within due time the assignee claimed a devolutive appeal to the Supreme Court of the State; and it was granted. Seasonable entry of the appeal was made in the Supreme Court; and that court affirmed the judgment of the court of original jurisdiction, holding, *First*, that the suit was a personal action against the owners, and not a proceeding *in rem* to enforce a maritime lien; *second*, that the State court, having acquired jurisdiction before the bankrupt proceedings were commenced, was not divested of jurisdiction by the decree adjudging the defendants bankrupts, so long as the amount of the debt claimed was in dispute and remained unascertained.

Application for a new trial was made, and was refused by the court; and Emory E. Norton, as assignee of the bankrupt defendants, sued out a writ of error, and removed the cause into this court.

Since the cause was entered here the assignee has assigned two errors, to the effect as follows: 1. That the State court was without authority or jurisdiction to render the judgment against the plaintiff in error, as assignee of John and Mary Hein, adjudged bankrupts, for the sum specified in the record. 2. That the judgment is erroneous, because the claim of the plaintiff was against the steamboat for a claim thereon, as master and superintendent, which was cognizable exclusively in the admiralty, and not in the courts of the State where it was adjudicated.

Assignees in bankruptcy are appointed by the creditors, and the judge or register is required to assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and the fourteenth section of the Bankrupt Act provides to the effect that all the properties of the bankrupt of every kind, including property conveyed by the bankrupt in fraud of his creditors, and all rights of action, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and that the assignee may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity pending at the time of

the adjudication of bankruptcy, in which such bankrupt is a party, in his own name, in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt. 14 Stat. 522, sect. 14; 14 id. 523.

Except where the amount is in dispute, no creditor of the bankrupt is allowed to prosecute his suit, whether at law or in equity, to final judgment, until the question of the debtor's discharge shall have been determined; but the provision is, that if the amount due the creditors is in dispute, the suit may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due; in which event the amount recovered may be proved in bankruptcy, but the execution must be stayed to await the determination of the question of discharge. 14 Stat. 527, sect. 21.

Argument to show that the assignee in bankruptcy may in his own name prosecute and defend suits pending in the name of the debtor at the time he, the debtor, is adjudged bankrupt, is quite unnecessary, as the act of Congress so provides in express terms; nor is it necessary in this case to determine whether the other party may, as matter of right, have process to compel the assignee to appear and prosecute or defend such a suit, where the assignee does not apply to the court to be admitted to prosecute or defend the suit in his own name. Such a question does not arise under the present writ of error, for the reason that the court of original jurisdiction passed an order that the assignee should be made a party defendant to the suit, in his capacity as such assignee, in the place and stead of the bankrupt defendants, and that he was subsequently made a party as ordered, in pursuance of a regular citation duly served, as appears by the return of the sheriff.

Judgment was rendered against him in the subordinate State court as assignee of the bankrupt defendants, and the record shows that he, as such assignee, took a devolutive appeal to the Supreme Court of the State, where the judgment of the subordinate court was affirmed. What he alleged in that court as the ground for claiming an appeal was, that there was error in the judgment to his prejudice; and the judgment having been affirmed in the Supreme Court, the assignee of the bankrupt defendants sued out the writ of error, and removed the cause

here for re-examination, from which it follows that it was his duty, under the rule of this court, to assign such error as he alleges occurred in the judgment. None of the proceedings prior to the judgment are specifically assigned for error; from which it may be assumed that they are correct, and they may be passed over without further remark.

Stripped of unnecessary verbiage, the first error assigned is to the effect that the State court was without jurisdiction to render the judgment exhibited in the transcript, for the reason that the assignee held his office and performed the duties thereof under the Bankrupt Act. Superadded to that is the allegation that the judgment and proceedings of the court below were in violation of the acts of Congress and the rights of the defendant, which, in the judgment of the court here, is nothing more than a repetition of the charge that the court was without jurisdiction in the case.

Errors must be assigned in a case like the one before the court; and the rule is, that the assignment "shall set out separately and specifically each error intended to be urged in the argument of the cause."

Aided by the opinion given in the State appellate court, it seems to be safe to assume that the assignee urged two propositions there, deduced from the decree in bankruptcy, as a ground for reversing the judgment of the court of original jurisdiction, both of which, it may be inferred from the printed argument, were intended to be embodied here in the first assignment of errors: 1. That the decree in bankruptcy divested the subordinate court of all authority to proceed further in the case. 2. That the court had no jurisdiction, in any point of view, to render judgment against the assignee, even in the form exhibited in the record.

Much discussion of the first proposition is unnecessary, as it is directly opposed to several provisions of the Bankrupt Act, and particularly to that one which empowers the assignee to defend as well as prosecute all suits at law or in equity, pending at the time the debtor is adjudged bankrupt, in which such bankrupt is a party. Nor does the view of the plaintiff here derive any support from the fact that the Bankrupt Act contemplates that the assignee shall make defence in his own name, inasmuch as

the same clause of the section provides that he may defend in the same manner and with like effect as the suit might have been defended by the bankrupt, which shows conclusively that the decree adjudging the debtor bankrupt does not *ipso facto* divest the court in such a case of all jurisdiction in the premises. Rev. Stat., sect. 5047.

Opposed to that, it is suggested that creditors having debts provable under the Bankrupt Act are forbidden to prosecute to judgment suits at law or in equity against the bankrupt; but it must be borne in mind that the prohibition in that regard only operates until the question of the debtor's discharge has been determined. Creditors cannot sue the bankrupt, and recover judgment against him pending the bankrupt proceedings; but the regulation in respect to suits pending when the proceedings commenced is special, and should receive careful consideration.

Pending suits are usually continued, at least during a reasonable time, for the reason that the Bankrupt Act provides that any such suit or proceeding shall, upon application of the bankrupt, be stayed, if there be no unreasonable delay, to await the decision of the bankrupt court as to the discharge of the debtor. Applications of the kind are usually granted; but the same section of the Bankrupt Act provides that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, the rule being, that the judgment ascertains the amount, but that execution must be stayed. 14 Stat. 527; Rev. Stat., sect. 5106.

Contradicted as the first proposition is by these several provisions of the Bankrupt Act, it is evident that it must be rejected as destitute of any proper foundation.

Taken literally and without explanation, the second proposition would be correct, as it assumes that the judgment in question is a personal judgment against the assignee, to be levied and satisfied out of his own goods and estate; which is an entire misapprehension of its true character and legal effect, whether the question is tested by the order making the assignee a party to the suit, or by the form of the judgment exhibited in the transcript. Instead of that, it is clear that the record negatives

every such pretence. Evidence to that effect is found in the preliminary suggestion made on behalf of the plaintiffs, which is as follows: That since the institution of the suit the defendants have been adjudged bankrupts, and that Emory E. Norton has been appointed and qualified as their assignee, and it appears that the court passed an order that the assignee of the defendants be made a party to the suit, *in his capacity aforesaid*, in place and stead of the defendants.

Much difficulty must attend any effort to misunderstand the true intent and meaning of that order, as it in terms makes the person named a party to the suit *in his capacity as assignee*, and in place and stead of the bankrupt defendants, and in no other character whatever; nor does it make any difference that the assignee did not appear at the trial, as the record shows that he was notified in person that he had been made a party to the suit. Having been duly served with a citation in due form, he might have appeared, if he had seen fit, and objected to the further prosecution of the suit by plea or motion; but he silently acquiesced in the order of the court; and, two continuances having followed, the court proceeded to hear the evidence and render judgment for the plaintiff that he recover of the representative party, assignee of the bankrupt defendants, the sum of $870, with legal interest until paid, with costs.

Suppose the judgment in this case must be regarded as a judgment against the assignee in his individual character, it would be clearly erroneous and void, as having been rendered without jurisdiction or authority of law; but we are all of opinion that it is not to be viewed in that light; nor is it pretended by the plaintiff below that he can proceed to take judgment against the bankrupts with the ordinary right to take out execution and levy it upon the property or estate of the bankrupt defendants in the hands of the assignee. What he claims is, that the judgment is a judgment against the estate of the bankrupts under administration in the hands of the assignee, and that he might lawfully proceed in the manner in which suits are prosecuted against executors and administrators by the creditors of the decedent, in order to establish the validity and ascertain the amount of their respective claims, and that the effect of the judgment is to fix the amount of the plaintiff's

demand against the bankrupts, which he will be entitled to file with the assignee as the basis of his claim for a dividend.

Certain creditors of an insolvent debtor who dies pending an action are allowed in many of the States to summon in the representative party and to prosecute the suit to final judgment, with a view of ascertaining the amount of the debt; and it is evident that the Bankrupt Act contemplates a corresponding proceeding by the creditor of a bankrupt when it provides that the creditor having a pending action against the bankrupt may, in a certain contingency, proceed to judgment for the purpose of ascertaining the amount due, and when it also provides that the amount so ascertained may be proved in bankruptcy. Execution, however, cannot be issued on such a judgment, the express provision of the same section being that the execution shall be stayed.

Adjudged cases may be found in which it is denied that such a judgment could be rendered under the prior Bankrupt Act; and those decisions are doubtless correct, for the reason that the act under which they were made contained no such provision as that enacted in the twenty-first section of the present Bankrupt Act. *Minot* v. *Bricket*, 8 Met. 560.

Persons coming in and proving their debts under the former act were prohibited from maintaining any suit at law or in equity for the same; and the provision was, that "all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." 5 Stat. 445.

Actions pending in favor of a creditor, under such circumstances, at the time the debtor is adjudged bankrupt under the present Bankrupt Act, if no objection is made by the assignee or the bankrupt court, may, due notice being first given to the assignee, be prosecuted to final judgment to ascertain the amount due to the creditor; but the judgment recovered will be effectual and operative *only* to establish the validity and amount of the claim.

Notice in due form having been given to the assignee, the judgment may be filed with him, as an ascertainment of the amount due to the creditor, and as a basis of dividends; but it is effectual and operative *only* for that purpose, the express

requirement of the same section of the Bankrupt Act being that the execution shall be stayed, from which it follows that the alleged privilege on the steamboat cannot be enforced, and that the closing words of the judgment recognizing such a privilege are irregular, unauthorized, and inoperative.

Keeping in view the special nature of the judgment and the limited scope of its operation, a few additional observations will be sufficient to show that there is no merit in the second assignment of error, which assumes in effect that the libel in this case is a proceeding *in rem*, and that the suit as such is exclusively cognizable in the admiralty and not in the State courts.

Libels *in rem* to enforce a maritime lien are exclusively cognizable in the courts exercising admiralty jurisdiction; but the difficulty in the way of the present plaintiff is, that the closing words of the judgment to which he refers are wholly inoperative and incapable of being enforced for any such purpose.

Special proceedings of the kind are utterly unavailing, where the defendant is adjudged bankrupt pending the action, and the suit is allowed to proceed to judgment under the twenty-first section of the Bankrupt Act, for the mere purpose of establishing the validity of the claim and the amount due to the creditor. Nor would it benefit the present plaintiff, in the support of his second assignment of error, even if it were conceded that the effect of the judgment is to secure to the plaintiff the alleged preference, for the reason that such a claim for services rendered to a domestic vessel does not, under the recent decision of this court, give rise to a maritime lien in favor of the person rendering the services. *The Lottawanna*, 21 Wall. 571. Seamen have a maritime lien for their wages wherever the services may be rendered; but that just rule was never extended to the master, except in cases where the lien is created by statute. *Smith* v. *Plummer*, 1 B. & Ald. 575; *Wilkins* v. *Carmichael*, 1 Doug. 101; *Hussey* v. *Christie*, 9 East, 426; Maclachlan on Ship. (2d ed.) 198; Maude & P. on Ship. (3d ed.) 91; *The Orleans*, 11 Pet. 184.

Authority does not exist in the State courts to hear and determine a suit *in rem*, as in the admiralty courts to enforce

a maritime lien. Doubt upon that subject cannot be entertained; but the recent decision of the court holds that such a lien does not arise in a contract for repairs and supplies to a vessel in her home port, and, if not, then it follows that in respect to such contracts it is competent for the states, under the prior decisions of the court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement. *The Belfast*, 6 Wall. 645; *The Moses Taylor*, 4 id. 427; *Hine* v. *Trevor*, id. 569.

Contracts for ship-building are held not to be maritime contracts, and, of course, they fall within the same category; but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the district courts sitting in admiralty.

Costs cannot properly be taxed to the assignee before he became a party to the suit. It was the assignee that removed the cause here, and of course he is liable for the costs in this court. *Read* v. *Waterhouse*, 12 Abb. Pr. N. S. 255; S. C. 52 N. Y. 588; *Holland* v. *Seaver*, 1 Fost. 387; *Penniman* v. *Norton*, 1 Barb. Ch. 248; *Smith* v. *Gordon*, 6 Law Rep. 314.

Judgment affirmed with costs in this court.

COHN v. UNITED STATES CORSET COMPANY.

1. To defeat a party suing for an infringement of letters-patent, it is sufficient to plead and prove that prior to his supposed invention or discovery the thing patented to him had been patented, or adequately described in some printed publication. A sufficiently certain and clear description of the thing patented is required, not of the steps necessarily antecedent to its production.
2. Letters-patent No. 137,898, issued April 15, 1873, to Moritz Cohn, for an improvement in corsets, are invalid, the invention claimed by him having been clearly anticipated and described in the English provisional specification of John Henry Johnson, deposited in the Patent Office Jan. 20, 1854, and officially published in England in that year.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit for an infringement of the complainant's letters-patent, which are as follows: —

UNITED STATES OF AMERICA.

"*To all to whom these presents shall come:*

"Whereas, Moritz Cohn, of New York, N. Y., has presented to the Commissioner of Patents a petition praying for the grant of letters-patent for an alleged new and useful improvement in corsets, a description of which invention is contained in the specification, of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and,

"Whereas, upon due examination made, said claimant is adjudged to be justly entitled to a patent under the law:

"Now, therefore, these letters-patent are to grant unto the said Moritz Cohn, his heirs or assigns, for the term of seventeen years from the fifteenth day of April, 1873, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

"In testimony whereof, I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh.

"Countersigned, "B. R. COWEN,
"*Acting Secretary of the Interior.*

[L. S.] "M. D. LEGGETT,
"*Commissioner of Patents.*"

UNITED STATES PATENT OFFICE.

Improvement in Corsets.

"Specification forming part of letters-patent No. 137,893, dated April 15, 1873; application filed Jan. 30, 1873.

"*To all whom it may concern:*

"Be it known that I, Moritz Cohn, of New York City, in the State of New York, have invented certain new and useful improvements in corsets; and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawing making part of this application:—

"Previous to my invention, it has been customary, in the manufacture of corsets, to weave the material with pocket-like openings or passages running through from edge to edge, or all stopped and finished off at a uniform distance from the edge, and adapted to receive the bones, which are inserted to stay the woven fabric, and

which serve as braces to give shape to and support the figure of the wearer. This method of manufacturing the corsets necessarily involves a great deal of hand labor, and, consequently, expense, in stitching up the ends where they are woven with pockets running through from edge to edge to hold the bones in place, or else the upper ends of the bones are necessarily all located at a uniform distance from the edge, resulting in a less perfectly shaped corset than is produced by following out my invention.

"I propose, by my invention, to overcome the objections just named, and produce a corset in which the location or position of the bones endwise shall be predetermined with the accuracy of the Jacquard in the process of weaving the corset stuff or material, while I at the same time effect a great saving of labor and expense, and give a more perfect shape. My invention has for its main object, therefore, not only the production of a better article, but also a reduction in the cost of manufacture; and, to these ends, my invention consists in having the pocket-like openings or passages into which the bones are put closed up near one end, at that point at which it is designed to have the end of each bone located, as will be hereinafter more fully set forth.

"To enable those skilled in the art to make and perfectly understand my invention, I will proceed to more fully describe it, referring by letters to the accompanying drawing, in which, for the purpose of illustration, I have represented two corsets, one made according to the mode of manufacture heretofore most generally practised, the other according to my new method.

"It will be seen, by reference to Figures 1 and 2, that the bones, *a*, are held or secured in place endwise in the pockets, *b*, of the corset material, C, by stitching, *e*, which is done after the insertion of the bone, and retains the bone endwise by closing up the passage-way or pocket in which it is located. This is in accordance with or illustrates the mode of manufacture originally practised, and only departed from prior to my invention, as heretofore explained.

"At Figures 3, 4, and 5 is illustrated, in elevation and longitudinal and cross sections, a corset made according to my improved plan.

"In these figures, A is the woven fabric of the corset, which, in lieu of being made with pocket-like openings or passages running through from edge to edge, or up to a uniform distance from the edge, I propose to have woven with pockets or passages, which extend from one edge of the fabric toward the other, but stop short

of the latter at such point or locality as is predetermined for the location of the end of each bone, according to the design or shape to be given to the corset, as shown. The fabric is woven with the pockets extending, as seen, from one edge, B, of the fabric to the points, *b*, *c*, *d*, &c., and from these points out to the edge, F, the fabric is woven solid or without any passages. *f f* represent the bones, which are made of the proper length, and are inserted from the edge, B, or at the open ends of the pockets. After their insertion, the bones are pushed "home" to the bottom of their respective pockets, when the mouths or open ends of the said pockets are closed up by the stitching and binding of the edge, B, of the corset, and the perfect retention of the bones thus effected.

"It will be understood, that, by forming the corset, as described, with pockets closed at one end, and weaving in such pockets of varying lengths, I am enabled to determine, in the manufacture of the corset-fabric, the precise points to which the subsequently inserted bones shall extend, and thus pattern any number of corsets exactly alike, and to the most desirable model.

"Corsets made according to my improved plan, it will be seen, can be made to a perfect and regular pattern, will be more desirable in appearance, and can be produced at less cost than those made according to the mode of manufacture practised previous to my invention.

"I am aware of, and do not claim, a woven corset with the pockets stopped and finished off at a uniform distance from the edge; I am also aware of, and do not claim, a hand-made corset with pockets of varying lengths stitched on; but what I do claim as new, and desire to secure by letters-patent, is —

"A corset having the pockets for the reception of the bones formed in the weaving, and varying in length relatively to each other, as desired, substantially in the manner and for the purpose set forth."

The defendants, among other defences, set up that the letters-patent granted to the complainant were anticipated by the English provisional specification left by John Henry Johnson, at the office of the Commissioner of Patents, with his petition, on 20th January, 1854, viz.: —

"I., J. H. Johnson, of 47 Lincoln's Inn Fields, in county of Middlesex, and of Glasgow, North Britain, gentleman, do hereby declare the nature of said invention for improvements in the manufac-

ture of stays or corsets, communicated to me by Adolphe George Geresine, of Paris, in empire of France, manufacturer, to be as follows: —

"This invention relates to the manufacture of what are known as woven corsets, and consists in the employment of the jacquards in the loom, one of which effects the shape or contour of the corset, and the other the formation of the double portions of slots for the introduction of the whalebones.

"These slots or double portions are made simultaneously with the single parts of the corset; and, in place of being terminated in a point, they are finished square off, and at any required length in the corset, instead of always running the entire length, as is usually the case in woven corsets.

"When the corset is taken from the loom, the whalebones are inserted into these cases, and the borders are formed, thus completing the article, which contains all the elegance and graceful contour of sewn corsets made by manual labor.

The court below, upon a final hearing, dismissed the bill; whereupon the complainant appealed to this court.

Argued by *Mr. Benjamin F. Thurston* for the appellant, and *Mr. George Gifford* for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

A careful examination of the evidence in this case has convinced us that the invention claimed and patented to the plaintiff was anticipated and described in the English provisional specification of John Henry Johnson, left in the office of the Commissioner of Patents on the 20th of January, A.D. 1854. That specification was printed and published in England officially in 1854, and it is contained in volume 2d of a printed publication circulated in this country as early as the year 1856. It is, therefore, fatal to the validity of the plaintiff's patent if, in fact, it does describe sufficiently the manufacture described and claimed in his specification. It must be admitted that, unless the earlier printed and published description does exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent. Keeping this principle in

view, we proceed to compare the plaintiff's invention with the antecedent Johnson specification. In order to do this, a clear understanding of the patent and of the invention the plaintiff claims to have made is indispensable. His application at the Patent Office was made on the 30th of January, 1873. In it he claimed to have invented "a new and useful improvement in corsets." After reciting that previous to his invention it had been customary in the manufacture of corsets to weave the material with pocket-like openings or passages running from edge to edge, and adapted to receive the bones which are inserted to stay the woven fabric, and which serve as braces to give shape to and support the figure of the wearer, but that it had been necessary, after the insertion of the bones into said pocket-like passages, to secure each one endwise by sewing, he proceeded to mention objections to that mode of making a corset. He specified two only. The first was, that it involved much hand labor and consequent expense in sewing in the bones, or securing them endwise in the woven passages; and the second was, that the arrangement or placement of the bones in the passages had to be determined by hand manipulation, and that it was, therefore, variable and irregular, such as frequently to give to the corset an undesirable shape or appearance near its upper edge. These objections he proposed to remove, and to produce a corset in which the location or position endwise of the bones shall be predetermined with the accuracy of the jacquard, in the process of weaving the corset-stuffs, or material, thereby effecting the saving of labor and expense in the manufacture. He, therefore, declared his invention to consist in having the pocket-like openings or passages into which the bones are put closed up near one end, and at that point at which it is designed to have the end of each bone located. The claim then made was as follows: "A corset woven with the pockets for the bones closed at one end, substantially as and for the purpose set forth." It is very evident, that, when this application was presented to the Commissioner of Patents, the only invention the applicant supposed he had made, and the only one claimed, was a corset the bone pockets in which had been closed at one end in the weaving. A patent for it was refused, for the reason assigned, that such a

corset was described in the printed publication of Johnson's specification. The plaintiff then amended his application, manifestly to set forth an invention differing in some particulars from that of Johnson. The amendment, however, proved insufficient, and a second rejection followed. Other amendments were then made, until his present patent was at last granted, dated April 15, 1873. In the specification which accompanies it the patentee admits, what he admitted at first, that prior to his invention it had been customary in the manufacture of corsets to weave the material with pocket-like openings or passages running through from edge to edge; and he makes the further admission, that it had been customary to weave the material with such passages all stopped and finished off at uniform distances from the edge. He, therefore, disclaims "a woven corset with the pockets stopped and finished off at a uniform distance from the edges," and disclaims also "a hand-made corset with pockets of varying lengths stitched on;" and his claim is, "a corset having the pockets for the reception of the bones formed in the weaving, and varying in length relatively to each other as desired, substantially in the manner and for the purposes set forth." The specification nowhere sets forth the manner in which the alleged improvements in the corsets are produced, unless it be by reference to a jacquard in the loom. No process is described. None is patented. The claim is for a manufacture, not for a mode of producing it. Its peculiarities, as described, are that the pockets for the reception of the bones are formed in the weaving, rather than by hand, and that they are of varying lengths relatively to each other; that is, that the pockets differ in length from other pockets in the same corset, as desired. There are no other particulars mentioned descriptive of the patented improvement, unless they are that the weaving or variations in the length of the pockets are to be in the manner and for the purpose set forth in the specification. Referring to that, the purpose avowed is the production of a better-shaped corset at less expense; and the manner of effecting this is by substituting weaving for stitching, in closing the pockets at desired or predetermined distances from the edge. Now, in view of the patentee's disclaimers, stopping off the passages or pockets in

the weaving is not covered by the patent. It is admitted that had been done before, and no claim is made for it. All that is left, then, is, that the woven and closed pockets in the corset vary in length. No rule is stated for the variation. It is not stated which are comparatively short and which long, or how much shorter some are than others, or how near any or all of them come to the edge. The demands of the claim in this respect are met, if some of the pockets desired to be longer than others are thus made. But the claim must be further limited in view of the state of the art when the application for the patent was made. The manufacture of hand-made and woven corsets is an art long known, — known long before the Johnson improvement. Those made by hand had gores inserted to give enlarged space for the breasts of the wearer, and also gores or gussets at the lower part to give space for the hips. In woven corsets these enlargements, equivalent to gussets, were formed by the jacquard loom. For more than twenty years it has been customary to weave in these gussets bone-pockets stopped off or closed in the weaving at various distances from the edge of the corset. Those extending upward from the lower edges were stopped off at varying heights, and those extending from the upper edge downward over the breast were woven close at their lower extremities at unequal distances from the top. It is true, that, where the stoppage was effected in weaving, the pockets in the gussets were closed pointedly, and unavoidably so, by the necessary contraction of the threads of the weft. But whether the stoppage was pointed, or blunt, or square, is unimportant. It is not claimed as a feature of the plaintiff's invention. His claim, then, cannot refer to the gusset pockets. The well-known state of the art, existing before even the Johnson description, requires its limitation. It must refer exclusively to the pockets under the arms of the wearer, or on the back, or in front of the body. It claims weaving them of various lengths when closed. That is all.

Having thus analyzed the plaintiff's alleged invention, and ascertained what it is, we are prepared to examine the Johnson provisional specification, and inquire whether it described with sufficient certainty and clearness a corset having the improvement claimed by the plaintiff. We quote at length the entire

description. Johnson, having declared the nature of the invention for which he sought a patent to be "improvements in the manufacture of stays or corsets," communicated to him by Adolphe Georges Geresme, of Paris, in the empire of France, described it as follows: "This invention relates to the manufacture of what are known as woven corsets, and consists in the employment of the jacquards in the loom, one of which effects the shape or contour of the corset, and the other the formation of the double portions of slots for the introduction of the whalebones. These slots or double portions are made simultaneously with the single part of the corset, and, in place of being terminated in a point, they are finished square off, and at any required length in the corset, instead of always running the entire length, as is usually the case in woven corsets. When the corset is taken from the loom, the whalebones are inserted into these cases, and the borders are formed, thus completing the article, which contains all the elegance and graceful contour of sewn corsets made by manual labor."

Undeniably this is a description of woven corsets, woven by the use of the jacquards in the loom, woven with slots or passages for the bones, made simultaneously with the other parts of the corsets, and requiring nothing to be done to them after their removal from the loom, except the insertion of the bones and the formation of the borders. It is also plainly a description of corsets in which the passages for the bones, called the double portions or slots, are finished; that is, stopped off in the weaving. That the expression "finished off square" means closed or stopped off square, is manifest, for several reasons. It is used to distinguish the manufacture from one in which the termination of the slots is pointed, as is always the case with the slots in the gussets, and necessarily so. The pointed terminations are closures, and the finished square terminations are only a different mode of closure. The idea in Johnson's mind was, therefore, that of ending, or termination by shutting up, or closing squarely, instead of enclosing pointedly. And it was the slot or passage that was to be finished off, and not merely the upper portion of the slot, or one of its sides. A second reason for concluding that the specification describes closed slots or passages is found in the concluding paragraph, which states,

that, when the corsets are taken from the loom, all that remains to be done to complete them is to insert the bones into these "cases," and form the borders. Thus, it is said, they are completed, "containing all the elegance and graceful contour of sewn corsets made by manual labor." There is not an intimation that the needle is to be applied after removal from the loom. This portion of the description is utterly inconsistent with the idea that the pockets are not closed by the weaving. If they are not, more is required to complete the corsets after the loom has done its work than forming the borders and inserting the bones. The pockets must be closed by stitching before they are ready for the bones. Besides, those parts of the corset which in one part of the specification are denominated "double portions of slots," and in another, "slots, or double portions" finished square off, are also called "cases," a word that expresses the idea of enclosure, and which is inapplicable to open passages. For these reasons, we cannot doubt that the meaning of the specification is, that the passages, slots, double portions, cases, pockets, by whatever name they are called, are to be closed in the weaving. And the plaintiff so understood it when he applied for his patent. In view of the published description to which his attention was called, he disclaimed stopping and finishing off the pockets in the weaving, and stated in his amended specification that he was aware of corsets thus made, and that it had been customary in the manufacture to weave the material with pocket-like passages, all stopped and finished off at uniform distances from the edge, and adapted to receive the bones.

It is manifest, then, that there is nothing in the plaintiff's patent which was not described in the Johnson specification, unless it be that the closed slots or cases mentioned in the former are required to be woven of varying length. A variation in the length of the pockets relatively to each other, as desired, is, as we have seen, the sole distinctive feature of the plaintiff's invention. But it was well known before Johnson filed his specification that the bone-pockets of a corset must vary in length. They were made to vary in hand-made corsets, and in woven ones by sewing. In all corsets, whether hand-made or woven, the pockets under the arms were made shorter, and

those at the back and in front were made longer, in order to fit the wearer and preserve a graceful shape at the top. Every person skilled in corset making knew the necessity of such variation. In Johnson's description, it was asserted that the shape or contour of his corset was formed in the weaving; so far, therefore, as that was effected by the relative length of the pockets, it was dependent upon the loom. The description left to the manufacturer to determine what should be the length of each pocket, in order to secure the elegance and graceful contour of sewn corsets; in other words, to determine before the weaving where the double portions or slots should be stopped off. Johnson knew — having before him the state of the art at the time — that pockets of uniform length would not adapt the corset to fit the wearer, and would not be consistent with elegance of shape. And there is not a word in his description that intimates the pockets are to be stopped off or closed at uniform distances from the edge or without variation in length. The contrary idea is manifest. It is said, they are to be finished (closed) *at any required length.* Required length? Required by whom, and for what? Plainly by the manufacturer; and that they may have all the elegance and graceful contour of sewn corsets made by manual labor, and also that they may fit the wearer. Such a requirement could be met only by pockets of different lengths in the same corset. And if they were stopped wherever required, and it was required that they should stop off at varying distances from the edges of the corset, the description pointed out a corset thus made. It is true, no particular length of the different pockets was specified, nor was any proportion mentioned which one pocket should bear in length to another. That was left to the manufacturer, as it is to the manufacturer of hand-made corsets, and as it is in the plaintiff's specification. He does not say how near to the upper edges of his corset the base of the closed pockets comes, nor what proportion in length one bears to the others. He simply describes them as varying in length relatively to each other, as desired. This is certainly not more definite than Johnson's description. In both, the variations in length and their relative proportions are left to the judgment and taste of the corset-maker. It is impossible, therefore, to

find any thing in the plaintiff's patent which was not with equal definiteness and perspicuity described in the printed publication (Johnson's specification), made nineteen years before the patent was granted.

It is quite immaterial, even if it be a fact, that the Johnson specification is insufficient to teach a manufacturer how to make the patented corset. It is enough if it sufficiently describes the corset itself. Neither it nor the plaintiff's specification exhibits the process of making. Neither of them set up a claim for a process. The plaintiff claims a manufacture, not a mode of making it; and the important inquiry, therefore, is, whether the prior publication described the article. To defeat a party suing for an infringement, it is sufficient to plead and prove that the thing patented to him had been patented or described in some printed publication prior to his supposed invention or discovery thereof. Rev. Stat., sect. 4920. What is required is a description of the thing patented, not of the steps necessarily antecedent to its production. But the evidence shows that the Johnson specification, in connection with the known state of the art at the time when it was filed and published, was sufficient to enable one skilled in the art of corset-making and in the use of the jacquard to make the patented corset. It is very clearly proved that it gave sufficient instruction, and that it needed no addition to furnish full information to a corset-weaver how to weave a corset with the use of the jacquard, and stop off all the bone-pockets in the weaving at the right places. It is also proved that the corset patented to the plaintiff can be made as easily by the use of two jacquards, as described by Johnson, as by the use of one; and it was so made during the trial of the present case. It is, however, unnecessary to consider the possibilities of two jacquards in operation at the same time in one loom. It could only be material if the plaintiff was claiming a process for making a corset. It is enough for this case that the invention patented to the plaintiff was clearly described in 1854, in the printed publication of the Johnson (Geresme) provisional specification. The patent is, therefore, invalid, and hence the decree of the Circuit Court dismissing the bill must be affirmed.

Decree affirmed.

MR. JUSTICE CLIFFORD dissenting.

Inventors are required, before they receive a patent, to deliver a written description of their inventions, and of the process of making, constructing, and using the same, "in such full, clear, concise, and exact terms," as to enable persons skilled in the art or science to make, construct, and use the same.

Power to grant letters-patent is vested in the commissioner; but when the power is exercised and the patent has been duly granted, it is of itself *prima facie* evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention.

Proofs are admissible to overcome that presumption; but it is well-settled law that patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of a prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, "in such full, clear, concise, and exact terms," as to enable any person skilled in the art or science to which it appertains, to make, construct, and use the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent. Applicants for a patent are as much required to describe the manner and process of making, constructing, and using the invention, as they are to file in the Patent Office a written description of the alleged improvement; and both are expressly required to be in such full, clear, concise, and exact terms, as to enable any person skilled in the art or science to make, construct, and use the invention.

Nothing deserving the least consideration is exhibited in the record to support the defence that the appellant is not the original and first inventor of the patented improvement, except the Johnson specification, which, in my judgment, does not contain or exhibit a substantial representation of the patented invention in such full, clear, concise, and exact terms, as to enable even an expert, without previous experiments, to make, construct, or practise the invention.

Instead of that, the provisional specification fails altogether to describe the means or mode of operation by which the

pockets of varying lengths are to be stopped or closed in the process of weaving. Conclusive support to that proposition is found in the fact that it became necessary for the infringers to experiment for a long time before they could imitate the patented product.

DODGE ET AL. v. FREEDMAN'S SAVINGS AND TRUST COMPANY.

1. Declarations made by the holder of a promissory note or of a chattel, while he held it, are not admissible in evidence in a suit upon or in relation to it by a subsequent owner.
2. The declarations of a party when in possession of land are, as against those claiming under him, competent evidence to show the character of his possession, and the title by which he held it, but not to sustain or destroy the record title.
3. In law, a person with whom a note is deposited for collection is the agent of the holder, and not of the maker. The maker has no interest in it, except to pay the note. Failing to do this, he leaves it to be dealt with as others interested may choose.
4. Where a note, deposited in bank for collection by its owner, was paid by a person not a party thereto, with the intention of having it remain as an existing security, and the money so paid was received by the owner of the note, — *Held*, that such person thereby became the purchaser of the note, the negotiability of which remains after as before maturity, subject to the equities between the parties.

APPEAL from the Supreme Court of the District of Columbia.

The Freedman's Savings and Trust Company, on the seventeenth day of May, 1873, exhibited its bill of complaint in the Supreme Court of the District of Columbia, alleging that it owned and held certain unpaid and overdue promissory notes made by the defendant Dodge, and that certain real estate in the city of Georgetown, which had been conveyed in trust to the defendants Jones and Darneille, to secure the payment of said notes, had been unlawfully and fraudulently released from the operation of the deed of trust, and had been conveyed by defendant Dodge to the defendant Darneille, who had conveyed it to the defendant Dunlop, in trust for the benefit of the wife of the defendant Darneille.

The bill prays for the cancellation of the release, and also of the other conveyances; for a sale of all the property covered

by the original trust deed; for the application of the proceeds to the payment of the notes; for damages, if any should be found, against Jones and Darneille; for judgment against Dodge for any balance of said notes remaining unpaid; and for general relief.

The defendant Dodge answered, admitting the making of the notes, and of the deed of trust to secure them, but insisted that the notes had been paid and extinguished through an arrangement between him and William S. Huntington for the purchase of one of the pieces of property included in the trust, and that the complainant obtained the notes after they were due and had been paid.

The other defendants made no defence, and a decree *pro confesso* was taken against all of them.

The case was heard upon the pleadings and evidence, and the court, at special term, dismissed the bill. This decree was, on an appeal to the general term, reversed, and a decree entered according to the prayer of the bill. The case is here on appeal by the defendants from that decree.

The defence rests entirely upon the allegation that the notes made by Dodge, in January, 1869, were paid in January, 1870.

Mr. Walter S. Cox for the appellants.

The appellee acquired the notes after maturity, and when they had been paid. A deposit for collection means for payment. It does not authorize the bank to assign, but simply to receive a payment which extinguishes the note. The notices sent out by the bank are a demand for payment. No one had a right to take an assignment of the notes without the consent of the holders. When, therefore, some one goes and tacitly pays the money into bank when due, and takes up the notes, the legal effect is a payment and extinguishment, whether it be by the maker or a stranger. Even if done at the request of the maker, if there be no further agreement, it is none the less a payment, and gives only a right of action for money paid, laid out, and expended. *Burr* v. *Smith*, 21 Barb. 262; *Eastman* v. *Plumer*, 32 N. H. 238; *Cook* v. *Lister*, 13 C. B. 594.

The only doubt ever entertained was, whether the debtor's authority or ratification was necessary. There can be no doubt of such authority in the present case.

Again: as the bank had no authority to transfer the notes, a person dealing with it must be presumed to have knowledge of that fact, and that he would acquire no title by the transfer. This infirmity of title would follow the notes into the hands of any one else taking after maturity. Byles on Bills, p. 151; *Texas* v. *White*, 7 Wall. 700.

But, besides, in this case, the notes were taken by the appellee from or through Huntington. He paid them under an express contract to do so, and transferred them after that contract had been performed.

It is clear that the appellee did not give the money directly to the holders of the notes. Their actuary gave one check for the entire sum, much larger than any one note. It must have been given first to some third person, who either had paid, or thereupon paid, the notes. That person clearly was Huntington.

The notes, taken when overdue, were taken subject to all defences which Dodge might have made against the holders to whom they were paid, or against Huntington, who held them afterwards. Story on Promissory Notes, sect. 190; *Andrews* v. *Pond et al.*, 13 Pet. 65; *Fowler* v. *Brantley*, 14 id. 318.

Mr. Enoch Totten for the appellee.

Dodge, the maker of the notes, has never paid a dollar on account thereof. He cannot now be heard to say that the notes were extinguished by the transaction between Huntington and the appellee. *Gernon* v. *McCan*, 23 La. Ann. 84.

The notes cannot be held to be paid and extinguished. The Trust Company surely did not intend to pay them. The fact that it took them into possession, and held them, shows this was not its intention. It acted in good faith.

When money is paid on account of notes by a third party not liable on them, the notes will be extinguished or not, according to the intention of the party paying. *Harbeck* v. *Vanderbilt*, 20 N. Y. 395. Payment to a bank of notes held by it for collection, by one not liable on the notes, does not amount to an extinguishment of them. Byles on Bills, 175; *Pacific Bank* v. *Mitchell*, 9 Met. 297; *Deacon* v. *Stodhart*, 2 M. & Gr. 317; *Jones* v. *Broadhurst*, 9 M., Gr. & Sc. 173.

Huntington did not pay out any money whatever; and, if he

ever had the notes in his possession, he held them only as cashier of the bank, or as agent of the Trust Company.

If these notes, instead of being transferred to the possession of the Trust Company, had been retained by the respective holders, and actions at law had been by them instituted thereon against Dodge, notwithstanding the payment of the amount due on them by the Trust Company, a plea of satisfaction by the Trust Company, interposed on behalf of the defendant Dodge, would have been bad on demurrer. *Clow* v. *Borst*, 6 Johns. 37; *Daniels* v. *Hollenbeck*, 19 Wend. 408; *Jones* v. *Broadhurst*, 9 M., Gr. & Sc. 173.

MR. JUSTICE HUNT delivered the opinion of the court.

It is conceded in the pleadings that Dodge made the notes in question; that the property described in the trust deed was conveyed to Jones and Darneille to secure their payment; that the notes were just debts, and the trust deed a valid security for their payment. Why, then, should not the security of the trust deed remain to the holder of the notes? The answer is, that the notes have been paid; therefore the trust deed has discharged its office, and the security by law reverts to or is held for the benefit of its original owner. The principle of law involved in this proposition is too plain to justify discussion, and hence it is that the defence, which seeks to cancel this security, rests upon the sole ground that the notes have been paid.

A portion of the evidence contained in the bill of exceptions consists of the declarations made by William S. Huntington. Evidence of this character was given by each party, and admitted, notwithstanding the objection of the other. No principle can be found to justify the admission of this evidence. It has long been settled that the declarations made by the holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent owner. This was settled in the State of New York in the case of *Paige* v. *Cagwin*, 7 Hill, 361, and is now admitted to be sound doctrine; and that the party is since deceased makes no difference (*Beach* v. *Wise*, 1 Hill, 612); or that the transfer is made after maturity (*Paige* v. *Cagwin*, *supra*). The same is

true of the declarations of a mortgagee (*Earl* v. *Clute*, 2 Abb. Ct. App. Dec. 1); or of the assignor of a judgment (16 N. Y. 497); or of an indorser (Anthon's N. P. 141); or of a judgment debtor (1 Denio, 202). Assuming that Huntington was the owner or holder of these notes, his declarations are not thereby made competent evidence.

Nor can these declarations be admitted in evidence, on the theory that Huntington was the owner of the real estate described in the trust deed, and in its actual possession. He never had a legal title, but occupied one of the houses described in the trust deed, a portion of the time as a tenant, paying rent, and during a subsequent period, as it is claimed, under a verbal agreement to purchase it from Dodge by paying the notes in question, paying interest on the notes instead of rent.

The declarations of a party in possession of land are competent evidence: 1st, As against those claiming the land under him. *Warring* v. *Warren*, 1 Johns. 340; *Jackson* v. *Cale*, 10 id. 377. The Freedman's Bank claim nothing under Huntington. They insist that they are the legal holders of the notes, and as such are entitled to avail themselves of the security given for their payment. 2d, Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title. *Pitts* v. *Wilder*, 1 N. Y. 525; *Gibney* v. *Marchay*, 34 id. 301; *Jackson* v. *Miller*, 6 Cowen, 751; *Jackson* v. *McVey*, 15 J. R. 234. To show that the party went into possession under the lessors is a common instance of the admissibility of such declarations. *Jackson* v. *Dobbin*, 8 Johns. 223.

Conceding, therefore, that Huntington was in possession of the premises, his declarations are competent only to show the character in which he claimed, as that of tenant under a lease, or tenant by virtue of an executory contract to purchase. His declarations as to the ownership or payment of the notes are incompetent upon every principle, and must be laid out of view in determining the case.

Upon the remaining evidence the question stands in this wise: The Freedman's Bank establishes its title to the notes

by the production of the notes, by proof that it purchased them by giving its check for $13,786.50, the full amount of principal and interest due on the notes, dated Jan. 24, 1870, and that it has held them from that time to the present. That the bank took the notes upon an intended purchase; that it received interest upon them in January, 1871, and again in January, 1872, is clearly proved. Eaton, the actuary of the bank, by whom the check was drawn, is dead. Huntington, with whom it is alleged an arrangement was made, is also dead. We are thus deprived of the evidence of the chief actors.

We think the truth is here. Huntington made a verbal agreement with Dodge to buy the house he had rented of him, and to pay these notes in satisfaction of the price. The evidence on this point is not free from doubt; and Huntington was certainly at liberty to repudiate the agreement, as being within the Statute of Frauds. But there is no evidence that he wished to do so. When the notes matured, he was not in a condition, or did not wish, to pay them. One note ($2,000) was held by the Chatham Bank, of New York, and sent for collection to the First National Bank of Washington, of which Huntington was the cashier. Huntington's bank forwarded the note to the Farmers' and Mechanics' Bank of Georgetown, and received credit for the amount, $2,121. This note was entered on the bank-books of Washington as due Jan. 24, and as being paid on that day. This was an error; it was, in fact, payable on the 22d.

The note of $4,000 was held by Mr. Robinson, who deposited it in the Farmers' and Mechanics' Bank of Georgetown, for collection, and on the 22d of January, 1870, he was there credited on his account with the amount, to wit, $4,242.

The $7,000 note was held by Mr. Todd, and was by him deposited in the National Metropolitan Bank of Washington, for collection, and his account was in like manner credited with the amount. The record contains no further evidence in relation to the payment of this note.

The evidence is complete and certain that Huntington did not pay the notes or advance the money by which they were taken up. The evidence is quite satisfactory that the Freedman's Bank did advance the money and take up the notes

by its check for $13,786.50, bearing date Jan. 24, and that it has held them since that time. There is no evidence that this check was actually drawn on that day; and it would reconcile some of the discrepancies, if we were to suppose that it bore date of the 24th, but was actually drawn on the 22d, and on that day used in the purchase of the notes. We do not see that it is very material which way this shall be held to be. The title of the Freedman's Bank is the same in either case. There is no evidence that it had knowledge of any obligation of Huntington to take up the notes, if any such existed; and there is no evidence that Huntington did any thing about procuring an arrangement for their being taken up. It dealt with the bank or banks holding the notes in the ordinary way. By law, a collecting bank is the agent of the holder of the note, and in no sense the agent of the maker. *Montgomery Bank* v. *Albany City Bank*, 7 N. Y. 459; 22 Barb. 627. What the holder was entitled to was his money, or the proper diligence to obtain it. If the maker had any thing to say or do in the premises, it was to present himself with the money when the notes matured, pay them, and secure his obligations. Failing in this, he leaves the securities to be dealt with as others interested may choose. There would appear, therefore, in the nature and propriety of the subject, to be no objection to a transfer to a third person paying the money, instead of a technical payment and discharge of the notes. It is to be observed, also, that payment technically can only be made by a party to a bill, or by a stranger, *supra protest.* Chitty on Bills, 392. Such parties may either pay in satisfaction of the note, or pay and hold it as by a transfer, leaving it an existing security. Byles on Bills, 166; *Green* v. *Key*, 3 B. & Ad. 313. It can, therefore, make no difference to the holder, whether, when taken by a stranger, it is taken and held as upon a transfer, or in satisfaction of the instrument. The negotiability of a bill or note remains after maturity as before (Byles, 160–162), subject to the equities between the parties.

The books are full of cases to the effect that an agent to whom a bill is sent for collection cannot lawfully transfer or pledge the same in payment of his own debt, and that the

transferee with knowledge or after maturity gets no title as against the true owner. 1 Pars. on Bills and Notes, 119.

In cases like that before us, where the intention to continue the existence of the note and not to cancel it by payment is made evident, when the money is paid to the collecting agent appointed to receive it, and the owner of the note receives the amount due to him, the authorities sustain the transaction as a purchase.

In *Deacon* v. *Stodhardt*, 2 Man. & G. 317, it was held, that where, to a count by the executors of A., an indorser, against D., the acceptor of a bill, the defendants pleaded payment, and the evidence was that A. had placed the bill in the hands of E. to be presented, who improperly had it discounted, and to regain possession of it paid the amount to the bankers of the acceptor, thus obtained the bill and returned it to A., it was held that there was no payment. Bosanquet, J., said, "It is clear that the payment of the bill by Jones was a payment not on account of the defendants (the acceptors), but that in order that Jones might regain the possession of it." Erskine, J., says, "It appears that Jones, having raised money on the bill, took it up when at maturity, and then returned it to the testator, who was at liberty to proceed upon it at any future time." The bill was thus paid at maturity without the knowledge or consent of the true owner, and was then remitted to the owner, and it was held to be a valid bill in his hands.

In the *Pacific Bank* v. *Mitchell*, 9 Met. 297, it was held, that where the holder of a bill of exchange accepted for the accommodation of the drawer sends it to a bank for collection, and the bank, when the bill comes to maturity, passes the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor, but the bank succeeds to the right of the holder, and may maintain an action on the bill against the acceptor. The plaintiffs, it was held, succeeded to the rights of the bank, and became *bona fide* holders of the bill.

In *Burr* v. *Smith*, 21 Barb. 262, it was held that a stranger may advance the money and hold the note, if such is the clear intention of the parties at the time of the transaction. The court remark upon it as a suspicious circumstance, that the payer in that case was not called as a witness. He knew, it is

said, in what character and in whose behalf he paid the money, and whose money it was with which the note was paid.

In *Harbeck* v. *Vanderbilt*, 20 N. Y. 395, it was held, that when the amount due upon a judgment is paid, wholly or in part, by one who is not a party nor bound by it, the judgment is extinguished or not, according to the intention of the party paying. So held, where one of the defendants in a judgment upon a joint obligation paid his aliquot portion in cash, gave his note for the remainder indorsed by a third person, and procured the judgment to be assigned to a trustee for such person, without his knowledge. The judgment, it was held, remained unsatisfied for the amount not actually paid by the defendant therein, and might be enforced by the indorser as an indemnity against his contingent liability.

In *Keystone Bank* v. *Gay*, 21 Barb. 459, the principle was laid down, that to constitute payment, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.

Judgment affirmed.

CALLANAN v. HURLEY.

1. A treasurer's deed for lands sold for delinquent taxes in the State of Iowa, if substantially regular in form, is, under the statutes of that State, at least *prima facie* evidence that a sale was made; and, if there was a *bona fide* sale, in substance or in fact, the deed is conclusive evidence that it was made at the proper time and in the proper manner.
2. In a case where a tax-deed, regular in form, recited that the land was sold Jan. 4, and where the treasurer certified that the sales of land for delinquent taxes in the county began on that day, and were continued from day to day until Jan. 18, and that he entered all the sales as made on the 4th, it was *held*, that a sale of land at any time during the period from the 4th to the 18th was valid, and that recording such sale as made on the first day, though actually made later, did not impair the title.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The complainant asserts title to the lands in controversy, by virtue of his having entered them pursuant to the provisions of the act of Congress; and the defendant Callanan claims to be

the owner, by force of tax-deeds of the treasurer of the county of Cass, founded on alleged sales made in January, 1864, for delinquent taxes. These deeds, having been placed upon record, are, as the plaintiff avers, a cloud upon his title, and the object of his bill is to procure their cancellation. He charges that they are void, for several reasons: *First*, that no taxes were levied upon the lands, or any of them, for the years for which they were pretended to be sold; *second*, that the taxes, if any there were, never became delinquent; *third*, that there was no person authorized to receive payment of the taxes; *fourth*, that there was no warrant or authority for the sale of the lands for the non-payment of delinquent taxes; and, *fifth*, that no sale of the land for the non-payment of taxes, real or pretended, ever took place, but that certificates thereof were issued, reciting, contrary to the truth, the sale of the lands conformably to the provisions of the statutes of the State, under which certificates the deeds and conveyances were respectively made. A subsequent amendment of the bill charges, *sixthly*, that at the time of the pretended assessments and levies the lands were not subject to taxation; and, *seventhly*, that two persons, Reynolds and Mead (through whom the defendant claims), at and before the issuing of the certificates of sale, unlawfully combined and confederated with the defendant for the purpose of preventing competition at the sale of lands for taxes then to be held in the county.

The court below, upon a final hearing, granted the prayer of the complainant's bill, and entered a decree accordingly; whereupon the defendant appealed to this court.

Argued by *Mr. R. P. Lowe* and *Mr. George G. Wright* for the appellant, and by *Mr. Thomas J. Durant* for the appellee.

MR. JUSTICE STRONG delivered the opinion of the court.

Before examining the objections to the validity of the tax-deeds which the original bill and its amendment suggest, it will be convenient to notice the provisions of the statutes of the State respecting tax sales, and respecting the effect of treasurers' deeds for lands sold for delinquent taxes. They are contained in the Revision of 1860, c. 45. After giving directions for sales of land by the county treasurer for delinquent taxes,

prescribing notice by advertisement, and providing for the cost of advertising, the treasurer is directed to offer separately, on the day of sale, each tract or parcel of real property advertised, on which the taxes and costs shall not have been paid; and it is declared, that the person who offers to pay the amount of taxes due on any parcel of land for the smallest portion thereof shall be considered the purchaser. The treasurer is directed to continue the sale from day to day as long as there are bidders, or until the taxes are all paid; and, after all has been offered, if any portion of the lands advertised remain unsold, the sale is to be adjourned. The purchaser is entitled to a certificate of purchase, describing the property and the amount of the tax; but the land may be redeemed at any time within three years from the day of the sale. At the expiration of three years, if the land remains unredeemed, the purchaser is entitled to a deed from the treasurer, the form and effect of which are defined by the statute. We quote a part of sect. 784 of the act, as having a controlling operation upon the facts of the present case. It is as follows: —

"The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and, when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, . . . and shall be *prima facie* evidence in all courts of this State in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: —

"1. That the property was subject to taxation.

"2. That the taxes were not paid before sale.

"3. That the property conveyed had not been redeemed at the date of the deed.

"And shall be *conclusive* evidence of the following facts: —

"1. That the property has been listed and assessed.

"2. That the taxes were levied according to law.

"3. That the property was advertised for sale in the manner and for the length of time required by law.

"4. That the property was sold for taxes as stated in the deed.

"5. That the grantee named therein was the purchaser.

"6. That the sale was conducted in the manner required by law.

"7. That all the prerequisites of the law were complied with by all the officers, . . . except in regard to the *three* points named in this section, where the deed shall be *prima facie* evidence only.

"And in all controversies involving the title under such tax-deed, executed substantially as required by law by the treasurer, the person claiming title adverse thereto, in order to defeat the same, *must* show, either that said property was not subject to taxation, or that the taxes had been paid before sale, or that the property had been redeemed from sale according to law. . . . And no person shall be permitted to question the title under the deed without first showing . . . *that all taxes due upon the property have been paid.*"

The whole act exhibits an intention of the legislature to enforce the payment of taxes, by securing purchasers at tax sales in their purchases, and thus making it dangerous for owners of property to neglect payment of taxes due the State. It removes difficulties which had before existed in the way of establishing a tax-title, and at the same time it works no injustice to owners of land subject to taxation. The law determines when the taxes should be levied, and when they shall be paid, and it gives ample time within which to make the payment. It was under this act, and in conformity with its provisions, that the treasurer's deeds were made, through which the defendant below made his claim. They are in the form prescribed by the statute. If the act is to have any effect at all, it is plain that the deeds cut off most of the averments upon which the plaintiff bases his attempt to obtain the cancellation he seeks. It is not open to him to aver and prove any allegation he puts forward to establish the invalidity of the deeds, except that the property was not subject to taxation, and that there was a fraudulent combination of the defendant with others to prevent bidding. The first of the averments is denied in the answer, and there has been no attempt to sustain it by evidence. Besides, the statute declares that the deeds shall be *prima facie* evidence that the property was subject to taxation. They are made affirmative evidence. The allegation of a fraudulent combination to suppress bidding at the sale is entirely unsustained by any thing in the proofs, and so is every allegation upon which the bill founds the charge that the deeds are invalid, unless it

be the averment that no sale for the non-payment of taxes, real or pretended, ever took place. The treasurer's deeds, however, contain a recital that he did, on the fourth day of January, A.D. 1864, by virtue of the authority vested in him by law, at the sale begun and publicly held on the first Monday of January, A.D. 1864, expose to public sale at the court-house in the county aforesaid (Cass), in substantial conformity with all the requisitions of the statute in such cases made and provided, the several pieces of real property above described separately, for the payment of the taxes, interest, and costs then due and remaining unpaid on each of said pieces of real property, respectively. The deeds further recite, that, at the time and place aforesaid, the persons to whom the deeds were made offered the most favorable bids, and that the several pieces of property were stricken off to them at the prices bid.

Now, if it be conceded that, under the statute, the deeds containing these recitals are only presumptive evidence that the sales were actually made as recited, the burden is still on the complainant to rebut this presumption. And we think that, instead of having rebutted it, the evidence in support of the presumption greatly preponderates. We need not refer to it in detail. Suffice it to say, that there is not a single witness who is able to deny that a sale was made; and only one is able to testify that, ten years after 1864, he cannot recollect it, while others testify affirmatively that it was made. At the treasurer's sale in January, 1864, there were large bodies of land offered; and the sale was continued from day to day. Whether the lands now in dispute were sold on the fourth day of that month, or at a later day during the sale, is, perhaps, not distinctly proved, and it is not necessary that it should be. If they were not sold until several days later, but yet while the sales were in progress, unadjourned, and the treasurer certified them as sold on the opening day, it was at most but an irregularity which cannot avail the complainant. It has not interfered with his right to redeem. He suffered eight years to pass after the sale without asserting any right. During all that period he paid no taxes, performed no duties which he owed to the public, suffered the defendant and those under whom the defendant claims to pay the taxes levied from year to year, and now,

when it may be presumed the land has increased in value, he seeks the cancellation of the tax-deeds, without even offering to redeem or to refund the taxes which the purchasers at the sale have paid. He seeks this in the face of a statute which, in effect, declares that irregularities shall not suffice to defeat a tax sale, and when, in view of the evidence, it is exceedingly doubtful whether in fact there was any irregularity. In this attempt he cannot succeed.

All the questions presented in this case have been decided by the Supreme Court of Iowa, and decided adversely to the complainant. *Phelps* v. *Meade et al.*, 41 Iowa, 470. That case was an attempt to set aside a tax-deed of lands sold by the treasurer of Cass County at the sale in January, 1864. The averments of the bill were the same as those made in this case, and the case was heard upon the evidence taken upon the case now before us. The rulings of the court were, that, if there was a *bona fide* sale in substance or in fact, the tax-deed is conclusive evidence that it was made at the proper time and conducted in the proper manner. And where a tax-deed, regular in form, recited that the land was sold Jan. 4, and the treasurer testified that the sales of land in the county for delinquent taxes began upon that day, and were continued until the 18th, and that he entered all the sales as of the date of the commencement, it was held, that a sale of land at any time during the continuance of the sale was valid, and that the recording of the sale as of the first day would not impair the title.

We do not find in the unreported case of *Butler* v. *Delano*, to which we have been referred, any thing conflicting with what was decided in *Phelps* v. *Meade*. The facts of the two cases, so far as we can gather them from the opinion of the court in the latter, were widely different. The same may be said of the other unreported case of *Thompson* v. *Ware et al.*

Decree reversed, and the cause remitted, with instructions to dismiss the bill.

MUTUAL LIFE INSURANCE COMPANY v. SNYDER.

1. The court is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts in issue.
2. The court below properly refused to give an instruction declaring that a fact was established by unimpeached and uncontradicted testimony, when the record discloses that the testimony touching such asserted fact was conflicting.
3. This court can only review so much of the instructions of the court below as was made the subject of an exception.
4. The omission of the judge to instruct the jury on a particular aspect of the case, however material, cannot be assigned for error, unless his attention was called to it with a request to instruct upon it.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Argued by *Mr. William A. Porter* and *Mr. George W. Biddle* for the plaintiff in error, and by *Mr. Edward J. Fox* and *Mr. Henry Green* for the defendant in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The contract of insurance, which is the subject of this suit, was effected by Monroe Snyder on his life, for the benefit of his wife. There was a judgment on the verdict in her favor, and the case has been brought here for review. At the trial, the company presented several points, on which, except the answer to the fourth point, the rulings of the court were satisfactory. An exception was taken, which presents the only question open for our consideration. The fourth point on which the request to charge was based is in these words: —

"The written applications bearing date Sept. 18, 1872, July 9, 1872, and Jan. 10, 1873, signed by the insured, form the basis of the contract of insurance; and the policies were issued to, and accepted by, the insured, upon the express condition and agreement, that, if any of the statements or declarations made in the application should be found in any respect untrue, then the policies should be respectively null and void; and Monroe Snyder, the insured, having, in answer to question No. 17 in each of said policies, which is, 'How long since you were attended by a physician? for what diseases? give name and residence of such physician,' answered, 'Not for twenty years;' while the testimony is unimpeached and uncontradicted, that Monroe Snyder was, in the month of December, 1867,

attended several times by Dr. Abram Stout, a physician, for a severe fall upon his head. This answer is untrue, and the policies are thereby rendered void, and the plaintiffs cannot recover upon them."

This proposition is not based on the idea that the answer of Snyder avoided the policy, if a physician attended him for any cause within a period of twenty years. It was easy to raise that question, and ask a specific instruction, which it would have been the duty of the court either to give or refuse. If it had been refused, the plaintiff in error could have brought the question here for the opinion of this court.

But the omission of the learned judge to instruct the jury on a particular aspect of the case, however material, cannot be assigned for error, unless his attention was called to it with a request to instruct upon it. Nor is it proper for us to intimate an opinion upon a question not presented by the record, which might arise in some other trial between this plaintiff in error and a policy-holder.

In discussing the propriety of the answer, it is desirable to understand the proposition submitted to the court for its adoption. It sets out with a statement of the contract, and affirms that Snyder's answer to the specific interrogatory No. 17, was untrue, because, by the uncontradicted testimony, he was, in December, 1867, attended by Dr. Abram Stout, a physician, for a severe fall upon his head. This being so, the legal conclusion is drawn that the policy is rendered void, and that the holder of it cannot recover.

It will be observed that the court is not asked to say to the jury that the attendance of a physician for a slight injury avoided the policy, nor was this the theory on which the case was tried. There was no evidence that Snyder was ever attended by a physician within twenty years, except when Dr. Stout visited him for a fall on the head. In the different points relating to other parts of the case, which were answered by the court to the satisfaction of the plaintiff in error, it was not the fact of the fall, but its severity, which was treated as being in avoidance of the policy. The fourth point also proceeds on the same supposition. It asserts that Snyder was treated for a severe injury, and deduces from the *nature* of that injury the legal conclusion, that there can be no recovery. While it is cor-

rect practice for the judge to instruct in an absolute form on an admitted state of the case, he is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts. Was it undisputed that Snyder had been attended "for a *severe* fall on his head"? The court did not think so, for it instructed in these words: "If the fall upon the head for which Monroe Snyder was attended by the physician was a severe one, the answer was untrue, and the verdict should be for the defendants." The proposition of law was thus affirmed; but the jury were left free to say whether the supposed fact on which it rested was established by the evidence. If the court had instructed in the terms prayed for, it would have usurped the functions of the jury; for, to say the least, there was evidence tending to show that the injury was but trifling. This was the opinion of the physician after he had observed its effects. He examined Snyder on his application for insurance, and reported that his life was safely insurable, and that he had never had any severe illness or injury. It is true, he stated that he had forgotten the fall on the head when the application was made out; but, had the fact occurred to him at the time, he does not think he would have put the injury down as a severe one. In view of this and the other evidence, it was the duty of the court to submit to the jury, "whether Monroe Snyder had been attended by a physician for a *severe* fall on the head." If, on this contested matter, the case had been taken from them, the plaintiff below would, in our opinion, have had just cause of complaint.

It is said that the court, in further answer to the fourth point, committed to the jury the construction of a written instrument in the following words: "So, if the jury find that the attendance of a physician was for any disease or injury, within the meaning of the question, the verdict should be for the defendant." It may be that this instruction, in the state of the evidence, is justly subject to criticism; but the exception of the plaintiff in error is confined to the charge and opinion in answer to the fourth point, and its requirements were fully met when the jury were told that, if the fall upon the head was a severe one, they should find for the defendant. The additional instruction was given by the judge *sua sponte*. *Non constat*, that he would not have either modified or withdrawn it on proper request, if its objec-

tionable features had been pointed out. Be this as it may, we cannot review it, as there was no exception to it. Apart from this, we do not see how the plaintiff in error was injured. The charge, so far from lessening, increased its chances to defeat the action. The jury had been told to find for it if the only injury in controversy was a severe one. After this, to charge them to find in the same way if, in their opinion, the medical attendance was for any disease or injury covered by the "question," was giving the company a larger opportunity to obtain a verdict than it had before. It was, in effect, informing them that they were at liberty to construe the "question" more favorably to the company than the court had done. To say the least, it left a better opening for the company to get a verdict than it had by reason of the answer of the court to the fourth point. *Judgment affirmed.*

NOTE. — A case between the same plaintiff in error and Snyder, a son of Monroe Snyder, deceased, was heard and determined at the same date as the preceding case. It involved precisely the same points, and was disposed of in the same manner.

EX PARTE KARSTENDICK.

1. Where a person, convicted of an offence against the United States, is sentenced to imprisonment for a term longer than one year, the court may, in its discretion, direct his confinement in a State penitentiary.
2. Imprisonment at hard labor, when prescribed by statute as part of the punishment, must be included in the sentence of the person so convicted; but, where fine and imprisonment, or imprisonment alone, is required, the court is authorized, in its discretion, to order its sentence to be executed at a place where, as part of the discipline of the institution, such labor is exacted from the convicts.
3. Where a court, in passing sentence of imprisonment in the penitentiary, finds that, in the district or territory where the court is holden, there is no penitentiary suitable for the confinement of convicts, or available therefor, such finding is conclusive, and cannot be reviewed here upon a petition for *habeas corpus;* and, where the Attorney-General has designated a penitentiary in another State or Territory, for the confinement of persons convicted by such court, it may order the execution of its sentence at the place so designated.
4. It is no objection to the validity of the order, that the State has not given its consent to the use of its penitentiary as a place of confinement of a convicted offender against the laws of the United States. So long as the State suffers him to be detained by its officers in its penitentiary, he is rightfully in their custody, under a sentence lawfully passed.

PETITION for *habeas corpus*.
Mr. David C. Labatt for the petitioner.
Mr. Solicitor-General Phillips, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Karstendick, the petitioner, was indicted for a conspiracy, and convicted May 1, 1876, in the Circuit Court of the United States for the District of Louisiana, under sect. 5440 of the Revised Statutes. The punishment for his offence, prescribed by the statute, is a penalty of not less than $1,000 nor more than $10,000, and imprisonment not more than two years. The sentence, as passed by the court, so far as it is material to the present inquiry, is as follows: —

"And, it having been in due form determined and ascertained that there is no penitentiary within the district of Louisiana, suitable for the confinement of persons convicted of crime in the courts of the United States, in said district of Louisiana, and the Attorney-General of the United States having, in due form, and by and with competent authority, designated the penitentiary at Moundsville, in West Virginia, as the place of confinement, subsistence, and employment of all persons convicted, or who may hereafter be convicted, by the courts of the United States, of crime against the United States of America, in said district of Louisiana, and such designation having been in due form notified to the court and entered upon the record thereof, . . . it is considered, by reason of the verdict herein, . . . that the said Otto H. Karstendick be confined in the penitentiary of the State of West Virginia, at Moundsville, in said State, for and during the full period of sixteen calendar months from and after this day, and that he do also further pay a fine of $2,000," &c.

In execution of this sentence, Karstendick is now imprisoned in the penitentiary at Moundsville, and he seeks through this application to obtain a discharge, alleging for cause that the order of the court for his imprisonment in a penitentiary, and without the State of Louisiana, is not authorized by law, and consequently void.

Sect. 5440 of the Revised Statutes is a reproduction of sect. 30 of an act of Congress, passed March 2, 1867, "to amend

existing laws relating to internal revenue, and for other purposes." 14 Stat. 484. At that time another act, passed March 3, 1865, "regulating proceedings in criminal cases, and for other purposes," was in force, which provided, in sect. 3, that "in every case where any person convicted of any offence against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court, by which the sentence is passed, to order the same to be executed in any State prison or penitentiary within the district or State where such court is held, the use of which prison or penitentiary is allowed by the legislature of such State for such purposes." 13 Stat. 500. This provision is also reproduced in sect. 5541 of the Revised Statutes, save only that the words "State jail" are substituted for the words "State prison," where they occur in the original act.

As early as 1834 Congress enacted that, whenever any criminal convicted of any offence against the United States shall be imprisoned in pursuance of such conviction, or of the sentence thereupon, in the prison or penitentiary of any State or Territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such prison or penitentiary is situated, and, while so confined in such prison, shall also be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory. 4 Stat. 739.

This provision is re-enacted in sect. 5539 of the Revised Statutes, the word "jail," however, being substituted in the revision for "prison," where it occurs in the original.

All these several statutes, being in *pari materia*, were, when in force before the revision, to be construed together. The same is true of the corresponding revised sections, and, under this rule, the same effect must be given to sect. 5440, that it would have if it read as follows: "All the parties to such a conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years." Sect. 5440. If the sentence of imprisonment shall be for a longer term than one year, the court passing the same may order it to be executed in any State jail or penitentiary

within the district or State where said court is held (sect. 5541), and the criminal so imprisoned shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated, and shall, while so confined therein, be exclusively under the control of the officers having charge of the same under the laws of the State. Sect. 5539.

This language is explicit, and, taken by itself, is certainly sufficient to authorize imprisonment in a penitentiary, at the discretion of the court, in all cases where the sentence is for a longer term than one year. But the counsel for the petitioner, in their argument, refer to other sections of the statute, which in terms provide for punishment by imprisonment at hard labor, and they seek to confine the power of imprisonment in a penitentiary to such cases; because, as they claim, imprisonment in a penitentiary necessarily implies imprisonment at hard labor; and where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment, is in excess of the power conferred.

We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. If the offence is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law.

This view of the case is strengthened by a further examination of the legislation upon this subject. As early as 1825, in an "Act more effectually to provide for the punishment of crimes against the United States, and for other purposes" (4 Stat.

118), it was enacted (sect. 15) that "in every case where any criminal convicted of any offence against the United States shall be sentenced to imprisonment and confinement at hard labor, it shall be lawful for the court by which the sentence is passed, to order the same to be executed in any State prison or penitentiary within the district or State where such court is holden, the use of which prison or penitentiary may be allowed or granted by the legislature of such State for such purposes." With this statute in force, the act of 1865, which has already been referred to, was passed, giving the same power in nearly the same words, where the punishment was by imprisonment for a longer term than one year, without any special requirement as to hard labor.

These two acts are separately re-enacted in the Revised Statutes. The act of 1825 is reproduced in sect. 5542, and that of 1865 in sect. 5541, the language of the two original acts being substantially retained in the revision. With this legislation in full force, it is impossible to believe that it was the intention of Congress to confine imprisonment in penitentiaries exclusively to cases in which hard labor is in express terms made by statute a part of the punishment.

Without extending the argument further upon this branch of the case, we are clearly of the opinion that the order of the court directing the imprisonment in a penitentiary is not void. It still remains to consider whether that part of the sentence which directed that the imprisonment should be in the penitentiary at Moundsville can be sustained.

It is conceded that Congress has the power to provide that persons convicted of crimes against the United States in one State may be imprisoned in another. Congress can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there; or it may arrange with a single State for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them. All this is left to the discretion of the legislative department of the government, and is beyond the control of the courts.

Acting under this power, Congress, while recognizing as

a rule the propriety of sentencing those convicted of crime against the United States to imprisonment in the jails or prisons of the State where their conviction was had, did, in 1864, to meet contingencies that might arise, enact that "all persons who have been, or may hereafter be, convicted of crime by any court of the United States, not military, the punishment whereof shall be imprisonment in a District or Territory where at the time of such conviction there may be no penitentiary or other prison suitable for the confinement of convicts of the United States, or available therefor, shall be confined, during the term for which they may have been, or may be, sentenced, in some suitable prison, in a convenient State or Territory, to be designated by the Secretary of the Interior." 13 Stat. 74. In 1872, the power of designating was transferred to the Attorney-General. This provision is also re-enacted in sect. 5546 of the Revised Statutes, the word "jail" being substituted for "other prison," and "suitable jail or penitentiary" for "suitable prison," in the original act. This section is to be construed in connection with the other sections which have been referred to. In fact, it may be treated as a proviso to sects. 5541 and 5542.

The counsel for the petitioner do not dispute the validity of this legislation; but they claim that in this case the conditions precedent to the execution of the sentence in a prison outside of the State have not been complied with, and consequently that the case is not brought within the power of the court to make such an order.

It is first insisted, that, as the State of Louisiana permits the use of its jails and penitentiaries for the punishment of criminals convicted in the courts of the United States, the sentences of imprisonment by those courts cannot be executed elsewhere. It is not enough that the jails and penitentiaries of the State may be used: they must also be suitable. Whether suitable or not, is a question of fact. In this case, the court passing the sentence has determined this question, and found that in the State of Louisiana there was no penitentiary suitable for the confinement of persons convicted of crime against the United States.

This finding is conclusive until reversed, and it cannot be

reviewed in this form of proceeding. To justify a discharge, under any writ to be issued upon this application, it must appear upon the face of the record that the order of commitment was void.

The court also decided, that, under the circumstances of this case, the punishment should be by imprisonment in a penitentiary. This made it necessary to ascertain whether any penitentiary outside the State had been designated by the Attorney-General of the United States for use when that in the State was found to be unsuitable.

As to this, the record shows, that, on the first day of April, 1876, the Attorney-General addressed the following communication to the United States Attorney at Louisiana: —

"Under the authority granted by sect. 5546 of the Revised Statutes of the United States, I designate the penitentiary at Moundsville, in West Virginia, as the place for the confinement, subsistence, and employment of all persons convicted, by the courts of the United States for the District of Louisiana, of crime against the United States, and sentenced by said courts to imprisonment longer than one year, on and after this instant. You will bring this designation to the notice of the courts, and have this order entered, if possible, on the records."

This action of the Attorney-General was brought to the attention of the Circuit Court, and the desired entry made.

This, as it seems to us, is clearly a designation under the statute, and we are unable to agree with the counsel for the petitioner in the opinion that it applies only to persons under conviction and sentence at the time the order was issued. It is true the language is, "all persons convicted . . . and sentenced;" and that certainly includes persons already convicted, but it does not necessarily exclude persons thereafter to be convicted. The statute makes it the duty of the Attorney-General to designate other places of confinement, whenever the jails or penitentiaries of a State are unsuitable or unavailable. That it was his intention to act in reference to future convictions as well as to past, is evident from the form of his communication, which is not addressed to, or, so far as appears, intended for, the marshal of the district, but to the attorney of the United States, for the purpose of being brought by him to

the attention of the courts. An order from the Attorney-General to the marshal was all that was necessary to effect a removal after sentence passed. No action of the courts was required. A notification to the courts was, therefore, only necessary for the purpose of influencing their conduct in the future. A sentence in this case for imprisonment in a State penitentiary would not have been void, but it might not have prevented the Attorney-General, acting under the statute, from directing a removal of the convict to some penitentiary outside of the State. Until such removal, the imprisonment in Louisiana would have been good. But if the court finds that the State penitentiary is unsuitable in fact, and the Attorney-General has designated another for use on that account, we can see no reason why the court may not sentence the person convicted to imprisonment at the place designated. Suppose there had been no penitentiary at all in the State, and under the law the Attorney-General had made his designation, would it for a moment be doubted that a sentence to imprisonment at the designated place would be good? But if a penitentiary is unsuitable within the meaning of the statute, how is the case different in principle from what it would be if there were none? The order of the Attorney-General is equivalent to a finding by him that the penitentiary of the State was unsuitable or unavailable for the confinement of criminals convicted under the laws of the United States; and when this action of the Attorney-General is supplemented by a finding of the same fact by the court, it seems to us to be as much within the power of the court to order the imprisonment at Moundsville, as it would have been if there had been no penitentiary at all in Louisiana. It certainly could not have been contemplated that the courts must in all cases sentence to confinement in the State where the conviction was had, without regard to the fact whether it could be executed there or not, and that the sole power of directing the sentence to be executed in another State was vested in the Attorney-General. That is neither within the letter nor the spirit of the statute. The sole power of designation is in the Attorney-General; but when he has designated, if the facts which authorize the change of place exist, it is as much within the power of the court to order its

sentence to be executed at the designated place, as to determine which of two prisons in a State, equally suitable and equally available for the punishment to be inflicted, shall be employed for that purpose. The policy of the law is to avoid circuity of action, and to permit the courts to do directly, as far as possible, all that they may do indirectly.

Neither is it an objection to the order, as made, that the designation of the Attorney-General is of a penitentiary alone. If the sentence of the court had been imprisonment in a jail, and the jails of the State of Louisiana had been found unavailable or unsuitable, a designation of some jail outside of the State might have been necessary before the court could have ordered a confinement outside of the State. But here the sentence is for imprisonment in a penitentiary; and as to that, as has been seen, there was a sufficient designation.

It is further insisted on behalf of the petitioner, that the legislature of the State of West Virginia has not given its consent to the use of the penitentiary of the State by the United States for the punishment of their criminals, and that for this reason the order for his confinement there is void. The petitioner is actually confined in the penitentiary, and neither the State nor its officers object. Congress has authorized imprisonment, as a punishment for crimes against the United States, in the State prisons. So far as the United States can do so, they have made the penitentiary at Moundsville a penitentiary of the United States, and the State officers having charge of it their agents to enforce the sentences of imprisonment passed by their courts. The question is not now whether the State shall submit to this use of its property by the United States, nor whether these State officers shall be compelled to act as the custodians of those confined there under the authority of the United States, but whether this petitioner can object if they do not. We think he cannot. So long as the State permits him to remain in its prison as the prisoner of the United States, and does not object to his detention by its officers, he is rightfully detained in custody under a sentence lawfully passed.

Neither do we think the objection tenable, that there can be no imprisonment in a penitentiary outside of Louisiana, if there

are within that State jails that are both suitable and available. It is for the court to determine whether the imprisonment shall be in a jail or a penitentiary. If in a penitentiary, then a penitentiary must be found inside of the State suitable and available, in order that the sentence to be pronounced may be executed there. If there is none, resort may be had to those of another State. Imprisonment need not necessarily be ordered in a jail because the penitentiary of the State is unsuitable.

As the whole record is before us, and the case has been fully argued upon the merits, the writ is *Denied.*

NOTE. — In *Ex parte Henderson*, the application for a writ of *habeas corpus* was denied, for the reasons assigned in the foregoing opinion.

THE "JOHN L. HASBROUCK."

1. The rule requiring a sailing-vessel to keep her course when approaching a steamer in such direction as to involve risk of collision does not forbid such necessary variations in her course as will enable her to avoid immediate danger arising from natural obstructions to navigation.
2. Where well-known usage has sanctioned one course for a steamer ascending, and another for a sailing-vessel descending, a river, the vessel, if required by natural obstructions to navigation to change her course, is, after passing them, bound to resume it. Failing to do so, and continuing her course directly into that which an approaching steamer is properly navigating, she is not entitled to recover for a loss occasioned by a collision, which the steamer endeavored to prevent, by adopting the only means in her power.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

This was a libel by the owners of the sloop "Venus" against the steam-propeller "John L. Hasbrouck," to recover damages for the sinking of the sloop by a collision with the propeller on the Hudson River, near West Point, on the night of Nov. 27, 1869. The District Court held that the collision was caused by the sole fault of the "Venus," and entered a decree dismissing the libel; which decree having been affirmed by the Circuit Court, the libellant brought the case here.

Argued by *Mr. William Allen Butler* for the appellant, and by *Mr. R. D. Benedict, contra.*

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Rules of navigation are ordained, and required to be observed, to save life and property employed in marine pursuits, and not to promote collisions, or to justify the wrong-doer where such a disaster has occurred. *The Sunnyside*, 1 Otto, 210.

Ships and vessels engaged in commerce ought to observe the rules of navigation in all cases where they apply; and it is safe to affirm that they always apply when there is impending risk of collision, except in special cases, where their observance would tend to promote what they were ordained to prevent, or where special circumstances render a departure from them indispensably necessary to avoid immediate danger. 13 Stat. 61.

Both parties admit that the collision described in the record occurred at the time and place alleged in the pleadings, and it appears that the owner of the sloop, having suffered pecuniary loss by the disaster, instituted a libel *in rem* in the District Court against the steamer, to recover compensation for the value of the sloop and her cargo.

Enough appears to show that the sloop was laden with flagging-stone, and that she was bound on a voyage from Catskill, on the Hudson River, to the city of Brooklyn; and that the steamer was bound on a trip up the river, with a barge lashed to her starboard side. Proper signal-lights were displayed by both vessels; and it is not controverted that they both had competent lookouts, nor that they were both well manned and equipped.

Precisely what took place before the sloop reached Newburg does not appear, nor would it be of much importance if it were known. When they left that place, they took in the mainsail and jib, for the reason that the wind blew pretty hard, and it appears that they did not hoist those sails again until they went past Magazine Point, which is on the east shore of the river. Before they reached West Point, all agree that the course of the sloop was well over to the west side of the channel of navigation. Throughout the same period the steamer was

proceeding up the river on the east side of the channel, which is the usual pathway of steamers navigating in that direction.

Sailing-vessels, especially when descending the river, usually keep well over to the western side of the channel, leaving the eastern side of the same for the uninterrupted passage of vessels propelled by steam. Usage has sanctioned that course of navigation, where there are no impediments or natural obstructions in the pathway of ascending or descending vessels. Vessels of all kinds, whether propelled by steam or sails, are allowed and expected to vary their respective courses to correspond with the well-known sinuosities of the navigable portion of the river, and to avoid the dangers of navigation arising from rocks, shoals, and sand-bars, as well as from curves and bends in the banks of the river or the channel of navigation.

Steamers running up the river may make such necessary variations in their course as is necessary to avoid every such natural obstruction to navigation; nor are sailing-vessels descending the river required to hold their course at the hazard of being grounded or shipwrecked by natural obstructions, even though they are required to adopt that precaution in all cases where a steamer is approaching, if the navigation is free from such difficulties. Instead of that, every mariner knows that a sailing-vessel descending the river from above West Point, if her course has been well over to the right bank of the river, must, as she approaches the bend in the river there, incline to port sufficiently to round the projection at that place, even if those in charge of her deck intend to continue down the river on the west side, in the same general course as the vessel pursued before they arrived at that locality.

Variations of the kind in the course of the vessel are allowable, because they cannot be avoided without imminent danger of immediate destruction; nor is a sailing-vessel under such circumstances forbidden to yield to such a necessity, even though those in charge of her deck are aware at the time that a steamer is coming up the river on a course which involves risk of collision, if it appears that a change of course is reasonably necessary to prevent the sailing-vessel from running into the bank, or encountering any other natural obstruction to the

navigation. Necessary changes made in the course of the voyage to avoid such obstructions are not violations of the sailing-rule which requires the sailing-vessel to keep her course whenever an approaching steamer is required to keep out of the way. Departures of the kind from the general requirements of the sailing-rules are rendered necessary to avoid impending peril and immediate danger, which can only be justified in such an emergency, and to the extent that the immediate danger demands their adoption.

Tested by these suggestions, it is clear that the sloop, when she found herself in the cove just above West Point, might properly incline to port sufficiently to clear any obstruction there and to round that point in safety; but it is equally clear that it was her duty, when that object was safely accomplished, to incline to starboard sufficiently to resume her regular course down the river, well over on the west side of the channel. Three considerations should have induced those in charge of her deck to adopt that course: 1. Because it was her regular course, as shown by the usages of the river. 2. Because the steamer was coming up on the opposite side of the river. 3. Because there were no vessels in view coming up on the western side of the channel.

Enough appears in the consequences which followed from the adoption of the opposite course to show that the preceding suggestions should have been adopted and followed, and that, if they had been, the disaster never would have happened. Proof of that is seen in the fact that the steamer, when the sloop emerged from the cove and her lights came in view as she rounded the point, was fast coming up on the eastern side of the river, without the least warning of approaching danger. For a moment the red light of the sloop came in view; but it soon disappeared, and was substituted by the green light, which indicates very clearly that the sloop held her course across the channel instead of inclining to the starboard, as she should have done, under a port helm, in order to resume her regular course down the river on the western side.

Danger being manifest from those indications, the steamer ported her helm and stopped her engine, which was all she could do in the emergency to prevent a collision. Her course

was already well over on the eastern side of the channel, and with a barge lashed to her starboard side she could not bear away much under a port helm, without being in danger of departing from the navigable channel of the river. Witnesses estimate the channel at that point as five hundred yards in width, and all agree that it is a good boating channel.

Hearing was had, and the District Court entered a decree dismissing the libel. Due appeal was taken by the libellant to the Circuit Court, where the decree of the District Court was affirmed, and the libellant appealed to this court.

Proof of a satisfactory character shows that those in charge of the sloop did not change the course of the vessel subsequent to the time when they first saw the lights of the steamer, and the mate of the sloop testifies to the effect that he first saw the lights of the steamer over the starboard bow of the sloop, that they were not then far enough around the point to see straight down the river, and that the steamer at that time was heading to the eastward of the sloop, which shows conclusively that the steamer was so far advanced when the mate made that observation that she could not prevent the collision by stopping her engine.

Conclusive support to the proposition that the sloop did not change her course from the time those on board of her first saw the lights of the steamer to the collision is also found in the testimony of the master of the sloop, in the allegations of the libel, and in the propositions of fact submitted by the libellant. Nothing appears in the record to justify the conclusion that the libellant even pretends that the sloop changed her course subsequent to the discovery of the lights of the steamer, or that those in charge of her deck did any thing to prevent a collision, unless it was to hold her course across the channel, towards the left bank of the river. Evidence to support any thing of the kind is entirely wanting. Opposed to that, the libellant contends that it was the duty of the sloop to hold her course, and insists that the steamer was in fault because she did not keep out of the way, as required by the fifteenth sailing-rule. 13 Stat. 60.

Beyond doubt, a steamer must keep out of the way of a sail-

ing-ship, where the two are properly sailing in such directions as to involve risk of collision; but neither that regulation, nor any other sea law, will justify a sailing-ship in unnecessarily leaving her pathway for the purpose of taking a course directly into the pathway of a steamer in order to compel the steamer to abandon the pathway in which she is properly navigating and seek another usually navigated by sailing-vessels, or incur the peril of an immediate collision.

Litigations of the kind prior to the present have come here, in which the evidence tended to show that steamers, in passing the locality where the collision in question occurred, usually navigate the eastern side of the channel, and that sailing-vessels, whether ascending or descending, usually pass on the opposite side. Testimony tending to prove such a usage in respect to the locality of the collision is exhibited in the case before the court; but the court here is not inclined to rest the decision of the case entirely upon that ground, for the reason that the evidence is satisfactory and uncontradicted, that the steamer was ascending on a course well over to the east side of the channel, and that the sloop, prior to reaching West Point, was descending the river on the western side, in the regular course of navigation.

Neither of those propositions can be successfully controverted: and, if not, the court is of the opinion that the sloop was not authorized to cross the channel to the eastern side; that all she had a right to do in that regard was to incline to port sufficiently to round the point in safety; and that it was negligent seamanship to continue to hold her course across the channel, or to deviate from her regular course, beyond what was necessary to correspond with the sinuosity of the channel; and that it was her duty, when that object had been safely accomplished, to have inclined to starboard, and have resumed her regular course down the river on the western side of the channel of navigation.

Necessary deviation to avoid the obstruction is plainly allowable; but to admit that the deviation may be continued after the necessity for it ceases, would be to concede that the sailing-vessel under such circumstances may hold her course across the channel, and force a collision with a steamer coming up on the

eastern side of the channel, or compel the steamer, if she can, to abandon her accustomed pathway and seek another pathway usually navigated by sailing-vessels.

Attempt is made in argument to exonerate the sloop, or those in charge of her, from all culpable negligence in the premises, by an appeal to the evidence, by which it appears, as the libellant contends, that the wind was not sufficient to enable the sloop to go to starboard after she rounded West Point. Support to that proposition, however, is not derived to any considerable extent from the libel, which, though it describes the wind as very light, nevertheless alleges that there was a strong ebb tide running; and the manifest theory of the libel is, not that those in charge of the sloop made any effort to port the wheel after the sloop rounded West Point, but that she held her course from the time the lights of the steamer were first seen to the moment of the collision.

Considerable conflict exists in the evidence as to the state of the wind; but the great weight of it shows that the wind was from the north-west, and that the theory of the libellant, that it was not sufficient to give steerage-way to the sloop, is not well founded. Important facts are disclosed in the testimony given by the libellant inconsistent with the theory that there was a calm. He, or his witnesses, admit that the wind blew hard before they got down to Magazine Point, so that they took in all sail; and it also appears from the testimony that when they had passed that point they again hoisted the mainsail to the reef, showing very satisfactorily that the wind was still too strong for a full sail.

Four witnesses, including the two pilots and the master and lookout, called by the steamer, testify that the wind was north-west, and that it was blowing a stiff breeze; and they are confirmed by one of the witnesses of the libellant, to the extent that there was a good strong breeze blowing down the river. Two witnesses from the barge were also examined in behalf of the steamer; and they also testified that the wind was blowing a good stiff breeze, and one of them stated that he inquired of the mate of the sloop why he did not have up all sail, and that the mate replied that it was because the wind was so heavy that they came down under bare poles. Five other witnesses

from other crafts were also examined by the steamer; and they all contradict the theory set up by the libellant, that there was a calm which disqualified the sloop from adopting the proper precaution to prevent a collision.

Conclusive evidence, if more be needed, is also found in the injuries which the sloop caused to the steamer by the blow, to show that the theory of the libellant as to the wind is incorrect. That the sloop held her course across the channel has already been shown, and it also appears that she struck the steamer on her port side some forty feet from the stem, the two vessels coming together nearly at right angles. Convincing proof is exhibited to that effect; and it appears that it was the bowsprit of the sloop that first struck the port side of the steamer, and the evidence shows that the force of the blow was such that it broke a hole through the outside planking, which was three inches thick, and also broke a hole through the inside planking, which was also three inches thick, and broke through an oak timber eight inches in diameter.

Viewed in the light of these facts and circumstances, we are all of the opinion that the decree of the Circuit Court is correct, and that there is no error in the record.

Decree affirmed.

SAGE ET AL. v. CENTRAL RAILROAD COMPANY OF IOWA ET AL.

1. To make a *nunc pro tunc* order effectual for the purposes of a *supersedeas*, it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done.
2. A motion to set aside a decree, made by persons not parties to the suit, but who are permitted to intervene only for the purpose of an appeal from the decree as originally rendered, will not operate to suspend such decree.
3. Their separate appeal having been properly allowed and perfected, the case is here to the extent necessary for the protection of their interests.
4. A cause, involving private interests only, will not be advanced for a hearing in preference to other suits on the docket.

MOTION, 1. To vacate a *supersedeas*; 2. Dismiss the appeal.

Mr. R. L. Ashhurst in support of the motions.

Mr. N. A. Cowdrey, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The Farmers' Loan and Trust Company, trustee for the bondholders secured by a mortgage of the Central Railroad Company of Iowa, whose claims amounted in the aggregate to $3,700,000, exclusive of interest, commenced a suit in the Circuit Court of the United States for the District of Iowa, Oct. 14, 1874, to foreclose the mortgage for the benefit of all parties interested in the security.

This was done at the request of a large number of the bondholders, and after much consultation between them in regard to their common interests. After the cause had been pending for nearly a year, and at some time between Oct. 1 and Oct. 22, 1875, Russell Sage, F. Leake, James Buell, and Edwin Parsons, presented a communication to the trustee, a copy of which is as follows: —

"*To the Farmers' Loan and Trust Company, Trustee, &c., First Mortgage Bondholders.*

"GENTLEMEN, — We are informed by your counsel, Grant and Smith, that they will ask the court, in the foreclosure suit now pending, to enter such decree as the majority of the bondholders desire. Believing that some of the bondholders have other interests to serve than to protect the first mortgage bondholders, and that large numbers of the bondholders, from want of proper information, have been induced to sign various requests to the court for certain forms of decree injurious to us as bondholders, and being your *cestui que trust* to the amount set opposite our names of the first mortgage bonds, to secure the payment of which you hold the mortgage as trustee for ourselves and others similarly situated, this is to notify you of such interest on our part, and to request you to instruct your counsel to procure the ordinary decree of foreclosure and sale; and, failing to get this from the court, to take an appeal to the Supreme Court of the United States.

"If, for any reason, you decline to give your counsel such instructions, please inform us, that we may become a party to said proceedings, and take such course as we may be advised in the matter. We understood the trust-deed to require you to procure the ordinary decree of foreclosure and sale. If the bondholders, or a majority of them, request you to purchase the mortgaged premises, and to form a new company, that it is competent for you to do so, upon such terms and conditions as a majority of the bondholders desire;

but, until you do so purchase, you are to do all you reasonably can be expected to do to protect the minority as well as the majority of your *cestui que trust.*

"Respectfully, your obedient servants,

"RUSSELL SAGE, $100,000.
"F. LEAKE, by Russell Sage, $25,000.
"JAMES BUELL, $10,000.
"EDWIN PARSONS, $13,500.

"NEW YORK, Oct. 1, 1875."

A term of the court commenced Oct. 11, 1875; and on the 22d of that month, the Farmers' Loan and Trust Company, the Central Railroad Company of Iowa, and all the other defendants, together with committees of various bondholders, represented by their respective attorneys, appeared in court and agreed to the form of a decree to be entered in the cause, the same having been the result of consultation and compromise among the parties in interest. At the same time the Farmers' Loan and Trust Company exhibited to the court the communication it had received from Sage and his associates, accompanied by a statement that Buell had deposited with it as trustee $10,000 of bonds secured by the mortgage, Leake, $25,000, and Sage, $100,000, and that it was ready to execute any decree which might be made by the court under the circumstances. The court thereupon, without considering the rights and interests of the various parties, entered, Oct. 22, 1875, the decree agreed upon, and then adjourned until some time in January, 1876.

Down to this time neither Sage nor any of his associates had asked to be made parties to the suit, or to be permitted to intervene in any manner for the protection of their interests, but, Dec. 16, 1875, Sage, Buell, and N. A. Cowdrey presented to the circuit judge, at St. Paul, Minn., the Iowa Circuit Court not being then in session, a petition, as follows: —

"Now comes the Farmers' Loan and Trust Company, as trustee in said cause for Russell Sage, James Buell, and N. A. Cowdrey, and plaintiff in said cause, and prays of the court that an appeal may be allowed to said plaintiff, and tenders to the court an appeal-bond, with a request that the same may operate as a *supersedeas.*" Signed, Farmers' Loan and Trust Company, by Grant and Smith, solicitors.

Upon this petition, the circuit judge entered his order, as follows: —

"In this case, an appeal is asked by the complainant so far, and only so far, as it affects the interests of Russell Sage, James Buell, and N. A. Cowdrey.

"I deny the appeal prayed for, because, —

"1. The decree in question was entered by consent of all the parties in interest.

("The term at which this decree was rendered has not yet ended, but stands adjourned until in January next; and the proper course for the parties in whose behalf an appeal is sought is for them to appear, and, if the decree is erroneously entered, or is improper, to apply to be made parties, or to have the decree corrected, or a new decree entered.)

"2. An appeal cannot be taken on behalf of certain bondholders, not parties to the record, leaving the rest of the decree unappealed from. As the trustees (complainants) do not ask for an appeal from the whole decree, I need not consider when they would be justified in a case where there are several millions of dollars of bondholders who acquiesce in the decree, to appeal at the instance of three bondholders who only claim to hold bonds to the extent of $200,000.

"3. If an appeal could be allowed, as asked for, the bond offered is insufficient, as to amount, to secure costs, damages for delay, and costs and interest on the appeal. The clerk will enter the above order of record, denying the appeal prayed for.

"(Signed) JOHN F. DILLON, *Circuit Judge.*

"AT CHAMBERS, ST. PAUL, Dec. 16, 1875."

The court met pursuant to adjournment, and, Jan. 11, Sage, Buell, and Cowdrey, claiming to be the owners of $200,000 of the bonds secured by the mortgage, filed their petition for leave to intervene in the suit as plaintiffs or defendants, to the end that they might have opportunity to protect the interests they had in common with the other holders of bonds, and with liberty to appeal to this court. Jan. 13, they filed a motion to set aside the decree of Oct. 22.

On the next day, Jan. 14, the cause came on for hearing upon the motion filed Jan. 13, the petition filed Jan. 11, and the petition presented to the circuit judge Dec. 16, with his order thereon. The motion to set aside the decree was

denied, and as to the other petition the following order was made: —

"Upon consideration of the premises, it is now by the court ordered, that Sage, Buell, and Cowdrey be, and they are hereby, permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the Supreme Court from the decree entered herein on the twenty-second day of October, 1875; and, if said Sage, Buell, and Cowdrey desire said appeal to operate as a *supersedeas*, the bond for that purpose is fixed at the sum of $1,000,000, to be given in thirty days from this date; and, if so given, said appeal shall be regarded as taken and perfected on the sixteenth day of December, 1875, the said parties having then applied as aforesaid for said appeal, and having delayed the same until this time by order of the judge at chambers, as above shown; but if said appeal is not to operate as a *supersedeas*, the bond is fixed at the sum of $2,000."

No bond was executed under the authority of this order, and, Feb. 16, 1876, a petition for the allowance of an appeal from the orders and decrees of Oct. 22 and Jan. 14, to operate as a *supersedeas*, was presented to Mr. Justice Miller, the justice of this court assigned to the eighth circuit, in which the district of Iowa is situated; and he allowed the appeal as prayed for, and accepted a *supersedeas* bond in the sum of $20,000. In due time the transcript of the record was filed in this court, and the appeal docketed.

The Farmers' Loan and Trust Company, represented by a joint committee of the bondholders, now move, 1. To vacate the *supersedeas*; and, 2. To dismiss the appeal.

1. As to the *supersedeas*.

In *Kitchen* v. *Randolph*, *supra*, 86, we held that it was not within the power of a justice of this court to grant a *supersedeas* on a writ of error or upon an appeal, unless the writ of error was sued out and served or the appeal taken within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of.

The decree in this case was rendered Oct. 22, 1875. At that time, the present appellants were not parties to the suit, and consequently could not appeal. The application of Dec. 16,

though made in their interest, was in form by the Farmers' Loan and Trust Company. This application was denied; and properly so, because an appeal was only asked so far as it affected the interests of these appellants. The trustee represents all the bondholders; and as the decree is indivisible, it must appeal for the whole, or none. No application was then made by the appellants for leave to intervene and become parties, and consequently the court could not then have been asked to allow them an appeal as parties. Such an application was, however, made Jan. 11; and Jan. 14 they were admitted as parties for the purpose of appealing. An appeal was then allowed to them; but they did not avail themselves of it, either by giving a *supersedeas* bond or a bond for costs. And if they had done so, it could not have had the effect of a *supersedeas*, because it was not allowed until after the expiration of the sixty days. The order of the court, to the effect that if the bond should be given the appeal might be regarded as taken and perfected Dec. 16, was of no effect for the purposes of a *supersedeas*. While it is true that the court may enter an order in a cause *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court (*Perry* v. *Wilson*, 7 Mass. 394), it is never done where the parties themselves have been at fault (*Fishmongers' Company* v. *Robertson*, 3 Man., Gr. & S. 974), or where it will work injustice.

A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. *Hogan* v. *Ross*, 11 How. 297; *Railroad Co.* v. *Harris*, 7 Wall. 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by

dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done.

A slight examination of the facts in this case will be sufficient to show that the failure to take this appeal in time is attributable entirely to the parties. They knew, more than twenty days previous to the entry of the decree, that there was a conflict of interest between them and a large majority of the bondholders, and that the trustee had been asked to have a decree entered such as those opposed to them desired. Instead of seeking to be made parties to the suit at that time, or during the first eleven days of the term and before the decree was entered, they contented themselves with a notice to the trustee and a demand upon it to procure such a decree as they required, and, if that could not be done, to appeal. This, too, when they knew that they had only $200,000 out of $3,700,000 of the secured bonds. After the decree was entered, they delayed any application to the court for leave to intervene for the protection of their own interest until after an adjournment to a remote day had taken place. Then delaying, until near the expiration of the sixty days, they caused the trustee to apply for leave to appeal, so far as their interests were affected, when it must have been apparent that such an order could not have been made. Even then they filed no application to be made parties so that they might appeal for themselves, but delayed all action in that behalf until long after the time when a *supersedeas* could be had as a matter of right. All this was the act of the parties, and not of the court.

It is claimed, however, that the motion filed by the appellants Jan. 13, to set aside the decree, operated to suspend the decree, and that under the authority of *Brockett* v. *Brockett*, 2 How. 238, they had until sixty days after their motion was denied to perfect an appeal and obtain a *supersedeas*. But there is an essential difference between that case and this. In that, the motion was made by parties to the suit. The motion was one that could be made without leave, and it was entertained. The cause was referred to a master upon this motion. Under such circumstances, the court held that the decree did

not become final until the motion for rehearing was decided. Here, however, the movers were not parties to the suit. They had no right to intervene, except upon leave; and this was refused. Under such circumstances, it is clear that the decree was not suspended in whole or in part by their motion. The appellants were permitted to intervene, but only for the purpose of an appeal. It would have been within the power of the court to set aside the old decree and enter it over again; but this was refused. Leave only was granted to appeal from the decree as originally rendered.

No *supersedeas* can follow from the appeal allowed by Mr. Justice Miller, because that clearly took effect after the expiration of the sixty days from the date of the decree. Neither can the order of the same justice have the effect of the allowance of a *supersedeas* on the original appeal, because, as has already been shown, that appeal was not taken in time.

From this it follows that the motion to vacate the *supersedeas* must be granted.

2. As to the appeal.

The appellants, by the order of Jan. 14, became parties to the suit for the purposes of an appeal. This order, having been made at the same term in which the decree was entered, was within the power of the court; and although it does not appear whether they were admitted as plaintiffs or defendants, it was sufficient to enable them to prosecute an appeal for the protection of their interests. Under this authority their appeal has been allowed and perfected. Whether this brings up the whole of the case, or only a part, it is not necessary now to consider. It is clear that these parties have been allowed their appeal; and that the case is here to the extent that is necessary for the protection of their interests. It is their separate appeal within the rule as to the form in which a severance may be obtained, which is laid down in *Masterson* v. *Herndon*, 10 Wall. 416. The motion to dismiss the appeal is, therefore, denied.

Both the appellants and the appellees ask to have the cause advanced for a hearing, but, as only private interests are involved we see no reason why it should have preference over other suits upon the docket. This motion also is denied.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE FIELD, dissenting.

I dissent from this opinion.

I think the Circuit Court, under the circumstances of the case, had a right to treat the application of appellants for appeal as having been made when they asked liberty to use the name of their trustee for that purpose; and it was rightfully allowed by the Circuit Court as of that date. If this be so, it is not denied that the bond approved by me would operate as a *supersedeas*.

DEBARY v. ARTHUR, COLLECTOR.

The act of Congress of July 14, 1870 (16 Stat. 262), imposed on champagne wine a duty of six dollars per dozen bottles (quarts), and three dollars per dozen bottles (pints), and upon each bottle containing it an additional duty of three cents.

ERROR to the Circuit Court of the United States for the Southern District of New York.

Mr. Stephen G. Clarke for the plaintiff in error.

Mr. Assistant Attorney-General Smith, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

The firm of DeBary & Co. sued the collector of the port of New York to obtain the return of an amount of duties which they alleged had been illegally exacted from them. The Circuit Court, holding that the exaction of the duties complained of was legal, rendered judgment for the defendant. The plaintiffs appeal to this court.

The question arises upon the act of Congress of July 14, 1870 (16 Stat. 262).

By sect. 21 of that statute it is enacted as follows:—

"There shall be levied, collected, and paid, the following duties," viz.:—

"On all wines imported in casks, containing not more than twenty-two per centum of alcohol, and valued at not exceeding forty cents per gallon, twenty-five cents per gallon; valued at over forty cents, and not over one dollar per gallon, sixty cents per

gallon; valued at over one dollar per gallon, one dollar per gallon; and, in addition thereto, twenty-five per centum *ad valorem*.

"On wines of all kinds, imported in bottles, and not otherwise herein provided for, the same rate per gallon as wines imported in casks; but all bottles containing one quart, or less than one quart, and more than one pint, shall be held to contain one quart; and all bottles containing one pint or less shall be held to contain one pint, and shall pay, in addition, three cents for each bottle.

"On champagne, and all other sparkling wines, in bottles, six dollars per dozen bottles, containing each not more than one quart, and more than one pint; and three dollars per dozen bottles, containing not more than one pint each, and more than one-half pint; and one dollar and fifty cents per dozen bottles, containing one-half pint each, or less; and, in bottles containing more than one quart each, shall pay, in addition to six dollars per dozen bottles, at the rate of two dollars per gallon on the quantity in excess of one quart per bottle: *Provided*, that any liquors containing more than twenty-two per centum of alcohol, which shall be entered under the name of wine, shall be forfeited to the United States. *And provided further*, that wines, brandy, and other spirituous liquors, imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package; and all such bottles shall pay an additional duty of three cents for each bottle."

The question presented by the record and arising under this statute is, What rate of duty is imposed upon "champagne in bottles"? More specifically, Is the duty of six dollars per dozen bottles imposed upon "champagne in bottles" in this act exhaustive and complete; or did Congress, while enacting a specific rate of duty by the dozen bottles for champagne in bottles, also impose a duty of thirty-six cents for each dozen bottles in addition to the six dollars per dozen specifically named?

The collector of the Port of New York, the defendant in this suit, answered the latter branch of this question in the affirmative. He collected upon the plaintiffs' champagne a duty of six dollars per dozen bottles (quarts), and also collected an additional duty of three cents upon each of the bottles containing the champagne.

In this, we think, he complied with the statute, both in its terms and in its spirit.

1. The language of the statute seems to require this construction. It is proved and conceded that this champagne is wine. The statute imposes duties under three heads: 1. On all wines imported in casks, of the value specified, and containing not more than twenty-two per cent of alchohol. 2. On wines of all kinds imported in bottles, not otherwise herein provided for, the same rate as upon wines imported in casks, and the bottles to pay three cents each in addition. 3. On champagne and other sparkling wines, six dollars per dozen for quart bottles, and other sums specified for smaller bottles.

After making these subjects of taxation, the section puts forth two provisos: 1st, That any liquors entered under the name of wine, containing more than twenty-two per centum of alcohol, shall be forfeited to the United States. This follows immediately after what has been before recited, and applies to all that precedes it. Any liquor entered as wine, which contains more than twenty-two per centum of alcohol, whether it is entered as wine generally, or champagne or sparkling wine, is condemned to the use of the United States. The second proviso is, that packages of wines, brandies, or other spirituous liquors, shall contain not less than one dozen bottles in each package; and all such bottles shall pay an additional duty of three cents for each bottle. Both branches of this proviso include all the liquors that have before been referred to. If still wine, or sparkling wine, brandy, or other spirituous liquors, is imported in bottles, there shall be not less than one dozen bottles in each package. This seems too plain for discussion. The section adds, and in language also embracing every kind of wine, brandy, or other spirituous liquors, that "all such bottles shall pay an additional duty of three cents for each bottle."

2. The tax upon the bottles is not only within the language, but it is also within the spirit and meaning, of the statute. A tax of three cents upon the bottle may seem too trifling to have been intended, where a tax of fifty cents upon the contents has already been imposed. That this is not so is apparent from the effort here made to avoid the tax, as well as from the allegation of the complaint that $5,218.68 has been thus paid by this single firm within a period of three months, — from December, 1872, to February, 1873.

Again: the customs acts from the earliest years of the government impose duties on liquors not only, but on the vessels containing them. This is not confined to any particular kind of liquor. The practice has been general and quite uniform. Act of July 4, 1789, 1 Stat. 25; June 29, 1795, 1 Stat. 411; Aug. 30, 1842, 5 Stat. 553; March 2, 1861, 12 Stat. 180; July 14, 1862, 12 Stat. 544; Feb. 8, 1875, 18 Stat. 307.

We do not see that the case is altered by the fact proved by an expert, that champagne must necessarily be imported in bottles. It is manufactured in bottles; that is to say, the process of fermentation by which the sparkling quality is communicated to the wine takes place, and must take place, after the wine is put into the bottle, and it cannot be removed from the bottle without practically destroying it. There is no reason to suppose that Congress was influenced in the least by a consideration whether a particular kind of wine could be imported in the cask, or must come in bottles. Champagne is a beverage singularly grateful to the taste, and is indulged in by those who are supposed to be able and willing to pay the tax upon it. It is an article of high luxury, and, upon the soundest principles of economy, should pay a high tax, that articles of necessity may, if possible, go untaxed. It is not strange, therefore, that in an act entitled an act to reduce internal taxation, and when the annual duties were reduced by many millions, the duty on champagne, and the packages in which it is imported, was retained at its height.

Differing from the former acts, this act provides that all wines imported in casks shall pay a prescribed duty upon the quantity, and also an *ad valorem* duty; while all wines in bottle pay a duty on the quantity and on the bottle.

We cannot recognize the argument that Congress, knowing that champagne, when imported, must come in bottles, considered the bottle a component part of the article, and no more intended its taxation than the cask in which brandy is imported. If Congress had used such language as declared an imposition of six dollars on a dozen bottles of champagne and then stopped, there might have been plausibility in the comparison. But when it imposes a duty "on brandy and other spirits manufactured from grain, of two dollars per gallon,"

and then stops, but taxes champagne in bottles, and declares in words that each bottle shall also be taxed, the argument is at an end. The authorities cited on this branch of the case are all within the principles we have laid down. We find nothing in them in conflict with these positions.

Nor do we attach importance to the manner in which the paragraph of the statute we are considering is divided. Wines, and apparently the entire class of wines, is the subject of this paragraph. Whiskey of domestic manufacture, spirituous liquors of whatever character, imported from other countries, are elsewhere taxed. Here Congress was giving its attention to the subject of wines. It intended to include as subjects of taxation wine of every character, and whether imported in casks or bottles. Duties were imposed upon it in each form as prescribed, unless it contained more than twenty-two per centum of alcohol, in which case it was declared to be forfeited. Whether the provision for taxing the bottle should be found in one place or another, we do not consider very material. Is it there, is the question. We find the duty on the bottle plainly laid in two different parts of the paragraph, and we are all of the opinion that it applies to champagne as well as to other wines. *Judgment affirmed.*

OSTERBERG v. UNION TRUST COMPANY.

1. A lien for taxes does not stand upon the footing of an ordinary incumbrance; and, unless otherwise directed by statute, is not displaced by a sale of the property under a pre-existing judgment or decree.
2. As the rule of *caveat emptor* applies to a purchaser at a judicial sale, under a decree foreclosing a mortgage, he cannot retain from his bid a sum sufficient to pay a part of the taxes on the property which were a subsisting lien at the date of the decree of foreclosure.
3. Where such a purchaser, having failed to punctually comply with the terms of sale, is granted an extension of time by the court, the property in the mean time to remain in the possession of a receiver, he is not entitled to any of the earnings of the property while it so remains in the possession of the latter, nor is he in a position to question the orders of the court as to their application.
4. Before the commencement of a suit to foreclose a mortgage, some of the lands covered by it had been transferred to a trustee, by way of indem-

nity against a bond upon which he was surety for the mortgagor, and sold by the trustee, with the consent of the mortgagee. The proceeds thereof were subsequently paid over to the receiver appointed in the foreclosure suit. The decree did not order the sale of the lands from which such proceeds arose, nor did the master attempt to sell them. *Held*, that the purchaser at the foreclosure sale acquired no right to such proceeds.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The Rockford, Rock Island, and St. Louis Railroad Company issued certain bonds secured by its mortgages to the Union Trust Company, the trustee of the bondholders. The trustee filed its bill to foreclose the mortgages, June 11, 1874, in the court below; and on the 29th of the following October a receiver was appointed to take charge of the money, real and personal assets of the company, and all its rights and property, with power to exercise its franchises, and, if need be, to sell, transfer, and convey, under the direction of the court, the whole or any part of the property; and it was further ordered, that the company and Lynde and Cable, or whoever may have possession thereof, do assign and deliver to the receiver the property, and all equitable interests, things in action, and other effects belonging to or held in trust for the company, or in which it had any beneficial interest, right, or title, at the time of filing the bill. The deed executed by the company pursuant to that order transfers to the receiver "all and every the estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property, and effects whatsoever and wheresoever, of or belonging or due to, or held in trust for, the said railroad company, or in which it had any interest, right, or title, at the time of filing the bill of complaint."

The receiver took possession of the property, and operated the road. On July 11, 1875, a decree was rendered finding the amount due the bondholders, and directing the sale of the road and of certain real estate, specifically described, and of "all rights, claims, and benefits in and to all leases, contracts, and agreements made with any parties owning any coal lands, or mineral lands, or railroad or railroads, or with any other parties for any other property, together with all and singular the tenements and appurtenances thereto belonging, and the reversions,

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Nor do we attach importance to the manner in which the paragraph of the statute we are considering is divided. Wines, and apparently the entire class of wines, is the subject of this paragraph. Whiskey of domestic manufacture, spirituous liquors of whatever character, imported from other countries, are elsewhere taxed. Here Congress was giving its attention to the subject of wines. It intended to include as subjects of taxation wine of every character, and whether imported in casks or bottles. Duties were imposed upon it in each form as prescribed, unless it contained more than twenty-two per centum of alcohol, in which case it was declared to be forfeited. Whether the provision for taxing the bottle should be found in one place or another, we do not consider very material. Is it there, is the question. We find the duty on the bottle plainly laid in two different parts of the paragraph, and we are all of the opinion that it applies to champagne as well as to other wines. *Judgment affirmed.*

OSTERBERG *v.* UNION TRUST COMPANY.

1. A lien for taxes does not stand upon the footing of an ordinary incumbrance; and, unless otherwise directed by statute, is not displaced by a sale of the property under a pre-existing judgment or decree.
2. As the rule of *caveat emptor* applies to a purchaser at a judicial sale, under a decree foreclosing a mortgage, he cannot retain from his bid a sum sufficient to pay a part of the taxes on the property which were a subsisting lien at the date of the decree of foreclosure.
3. Where such a purchaser, having failed to punctually comply with the terms of sale, is granted an extension of time by the court, the property in the mean time to remain in the possession of a receiver, he is not entitled to any of the earnings of the property while it so remains in the possession of the latter, nor is he in a position to question the orders of the court as to their application.
4. Before the commencement of a suit to foreclose a mortgage, some of the lands covered by it had been transferred to a trustee, by way of indem-

nity against a bond upon which he was surety for the mortgagor, and sold by the trustee, with the consent of the mortgagee. The proceeds thereof were subsequently paid over to the receiver appointed in the foreclosure suit. The decree did not order the sale of the lands from which such proceeds arose, nor did the master attempt to sell them. *Held*, that the purchaser at the foreclosure sale acquired no right to such proceeds.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The Rockford, Rock Island, and St. Louis Railroad Company issued certain bonds secured by its mortgages to the Union Trust Company, the trustee of the bondholders. The trustee filed its bill to foreclose the mortgages, June 11, 1874, in the court below; and on the 29th of the following October a receiver was appointed to take charge of the money, real and personal assets of the company, and all its rights and property, with power to exercise its franchises, and, if need be, to sell, transfer, and convey, under the direction of the court, the whole or any part of the property; and it was further ordered, that the company and Lynde and Cable, or whoever may have possession thereof, do assign and deliver to the receiver the property, and all equitable interests, things in action, and other effects belonging to or held in trust for the company, or in which it had any beneficial interest, right, or title, at the time of filing the bill. The deed executed by the company pursuant to that order transfers to the receiver "all and every the estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property, and effects whatsoever and wheresoever, of or belonging or due to, or held in trust for, the said railroad company, or in which it had any interest, right, or title, at the time of filing the bill of complaint."

The receiver took possession of the property, and operated the road. On July 11, 1875, a decree was rendered finding the amount due the bondholders, and directing the sale of the road and of certain real estate, specifically described, and of "all rights, claims, and benefits in and to all leases, contracts, and agreements made with any parties owning any coal lands, or mineral lands, or railroad or railroads, or with any other parties for any other property, together with all and singular the tenements and appurtenances thereto belonging, and the reversions,

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remainders, tolls, incomes, rents, issues, and profits thereof; and also all the estates, rights, titles, and interests whatsoever, as well at law as in equity, of the said Rockford, Rock Island, and St. Louis Railroad Company, of, in, and to the same; . . . and all other property, real and personal, belonging to said Rockford, Rock Island, and St. Louis Railroad Company, and which is now in possession of said receiver, and hereinafter described or referred to; and all other property, rights, franchises, and things which shall have been acquired by purchase or otherwise, by the said receiver, during the pendency of this suit for use in connection with said railroads, and shall be at the time of the sale hereby decreed in his possession, or to which he may then be entitled."

The master appointed by the court sold the said road, franchises, &c., Aug. 16, 1875; and, when offering it, publicly declared, "I am ordered by the court to say, that from the proceeds of the sale will be retained a sum sufficient to provide for the taxes of 1873 and 1874."

The appellant became the purchaser of the property for the sum of $1,320,000, and paid in cash, conformably to the order directing the sale, $200,000. On the 3d of November, 1875, the court, upon the report of the master, made a further order, directing that the appellant be let into possession on the payment of an additional sum of $350,000, and the delivery of coupons and bonds of a specified amount, he to have the earnings of the road and to pay its expenses after Nov. 1 of that year; but the court decreed, that, on the payment by the appellant of the residue of the purchase-money on or before Dec. 5, 1875, the sale should be confirmed, and that the appellant might apply to the master under the direction of the court for a deed conveying to him the property purchased at the sale. He took possession accordingly on the 9th of that month. On the twenty-eighth day of January, 1876, an order was made extending the time for the payment of the residue of the purchase-money until the 1st of April; and on May 27 of that year an order was made confirming the sale and directing a conveyance, which was carried into effect.

The receiver continued to act until July 26, 1876, when he was discharged from his trust. In his formal report of that

date, he states that he had in his hands four bonds of the United States, of $1,000 each, on which he had collected interest amounting to $133.80, and the further sum of $1,395.72, which bonds and money he had received from Henry Curtis, Jr., and the sum of $2,000, which he had received from Cornelius Lynde, and that from the earnings of the road there remained in his hands the sum of $7,417.13. These moneys and the bonds were paid into the hands of the clerk of the court. The taxes on the property for 1875 were not paid by the receiver. The moneys and bonds received from Curtis and Lynde were held by them in trust, and were obtained in the following manner: —

Before the bill to foreclose was filed, several judgments had been recovered against the company, from which it desired to appeal, and Lynde and Curtis, at its instance, became security upon the appeal-bonds. For the purpose of indemnifying them, certain lands, covered by said mortgages, were conveyed to Curtis, and certain moneys, the earnings of the road, were deposited with him and Lynde before the commencement of the suit to foreclose. By the authority of the company, Curtis sold a part of said lands, and converted a part of the moneys into government bonds. Such of the lands as were not sold by him were sold under the decree by a specific description. The lands which had been sold by Curtis were not mentioned or described in the decree, or in the advertisement of sale. The judgments were reversed, or otherwise settled and disposed of; and the property thus held by Curtis and Lynde was released, and they were discharged from their trust about the month of May, 1876, whereupon they delivered to the receiver the bonds and money above mentioned, and Curtis conveyed to him the unsold lands. All the land sold by Curtis was sold before the commencement of the foreclosure suit, and the only money received by him thereafter was for rents and interest. The lands not sold by him were conveyed under the order of the court to the appellant, as the purchaser under the decree.

The appellant, upon these facts, claims that he is justly entitled at law and in equity to the bonds and moneys delivered to the receiver by Curtis and Lynde, and by him paid into court.

By the statutes of the State of Illinois all taxes are made a lien on the first day of May of each year, for that year. Assessments are made between the first day of May and the first day of July in each year. They are reviewed by the town and county boards, and reported to the State auditor for equalization on or before the tenth day of July. The State Board of Equalization meets on the second Tuesday in August, and within the first ten days of December of each year books and warrants for the collection of taxes are delivered to the collectors.

The taxes assessed upon said railroad and franchises, and property for the year 1875, amounted to the sum of $23,000 and upwards; and the appellant claims that the said sum of $7,417.13 is legally and equitably applicable in payment of said taxes.

The court below held that the money and the proceeds of the bonds should, with the other funds in court, be distributed among the creditors, and Osterberg appealed to this court.

Submitted on printed arguments by *Mr. J. R. Doolittle* for the appellant, and by *Mr. C. B. Lawrence* for the appellee.

MR. JUSTICE DAVIS delivered the opinion of the court.

We are unable to perceive that the appellant is entitled to the relief which he seeks.

1. The taxes for 1875 were, at the date of the decree, a subsisting lien upon the mortgaged property, and he had not only constructive but actual notice of its existence. It is true that the title of a purchaser at a judicial sale under a decree of foreclosure takes effect by relation to the date of the mortgage, and defeats any subsequent lien or incumbrance. A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title. But if the doctrine were otherwise, and if the rule of *caveat emptor* had no application to this case, we are not aware of any principle which would justify withholding from the mortgagee any of the moneys

derived from the sale of the mortgaged property, with a view to the application of them to satisfy such a lien. This is not a controversy between incumbrancers. It is, in effect, a proceeding by a purchaser at a judicial sale to apply a portion of his bid to the partial discharge of an incumbrance to which he admits that the property in his hands is subject. Even if the law had not imposed on the purchaser the burden of discharging it, the terms of sale, as announced by the master, clearly did so.

2. He has no rightful claim to any part of the earnings of the road whilst it remained in the possession of the receiver, nor is he in a position to question the orders of the court, as to the application of those earnings. The road would have been surrendered to him at an earlier date had he punctually complied with the terms of the sale; but the court, under the peculiar circumstances of the case, extended to him an indulgence in making the required payments. In the mean time, the road remained in the custody of the receiver, and its earnings were devoted to the payment of current expenses and other meritorious claims.

3. Nor has the appellant a right to the money and government bonds which came to the hands of the receiver from Henry Curtis and Cornelius Lynde. So soon as they were relieved from the trust upon which these persons held them, they belonged in equity to the bondholders. The purchaser could acquire no right to them, as he bought only the property which the decree directed to be sold; and it did not order the sale of this fund, nor did the master attempt to sell it. If the deed of the receiver to Osterberg is broad enough in its language to cover this fund, it is to that extent void, as he was only authorized to convey the property previously described in the decree and sold by the master at the sale.

Decree affirmed.

LOVEJOY v. SPAFFORD ET AL.

1. A., having had no previous dealings with a firm, but having heard of its existence, and who composed it, sold goods to one of the partners, and received in payment therefor a draft by him drawn upon the firm, and accepted in its name. At the time of the transaction the firm was, in fact, dissolved; but A. had no notice thereof. *Held*, that, in order to protect a retired partner against such acceptance of the draft at the suit of A., evidence, tending to show a public and notorious disavowal of the continuance of the partnership, is admissible.
2. It is not an absolute, inflexible rule, that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard, — as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership, — are proper to be considered on the question of notice.

ERROR to the Circuit Court of the United States for the District of Minnesota.

The testimony, as exhibited by the bill of exceptions, is set forth in the opinion of the court.

The court below charged the jury as follows: —

"The facts in this case are, in the main, undisputed. The plaintiffs seek to hold the defendant, Lovejoy, for the payment of two acceptances of J. B. Shaw & Co. To establish his liability, the plaintiffs must show that Lovejoy was a member of the firm of J. B. Shaw & Co., and was a joint promisor, or that, having ceased to be a member of the firm, he still remained liable for obligations made in the name of the firm, by reason of failure to give proper notice of the dissolution of the firm to the public. Had he been a member of the firm when the acceptances were given, there would be no doubt of his liability. It is material for you to decide whether credit, on the sale of the lumber at Reed's, was given to J. B. Shaw alone, or to J. B. Shaw & Co. If to Shaw alone, then Lovejoy would not be bound. From 1868 to May 12, 1870, Lovejoy was a member of the firm of J. B. Shaw & Co. This is not disputed. It also appears that, on May 12, 1870, the firm was dissolved. Plaintiffs claim, notwithstanding the dissolution, Lovejoy is liable, because the lumber was sold on the credit of the company, and no notice given them of any dissolution. If you find that the sale at Reed's was, in fact, made to the firm, and that the plaintiffs, in making such sale, gave the credit to the firm of J. B. Shaw & Co.,

and relied on such credit, then Lovejoy cannot escape liability unless he has given legal notice. Many interesting questions, as to what is proper notice to persons who have not been dealers with the firm which has dissolved, have arisen in this case. It is not necessary for me to go to the extent of those authorities which hold that, in cases of dissolution, in order to avoid liability on the part of retiring partners to strangers, that there must be actual notice, or public notice by advertisement in a newspaper. I do not say that these are the only kinds of proper notice that might be given. In this case, there is no evidence of any public notice; for private communications made to particular persons at the place where the firm did business, or elsewhere, is not sufficient notice to bind other persons.

"There are two questions for you to decide:—

"*First*, Was there such a firm as J. B. Shaw & Co., and was Lovejoy a member thereof up to May 12, 1870? This is undisputed.

"*Second*, Did plaintiffs, or their assignees, as in the case of the Mead draft, have reasonable knowledge or information that the firm of J. B. Shaw & Co. still existed at the time the lumber was sold? Knowledge obtained from public notoriety, and from individuals who had knowledge thereof, was sufficient to warrant the plaintiffs in such a belief. If the evidence warrants you in finding that Angell or Mead had reason to believe that the dissolution had taken place at the time of the sale, then the plaintiffs cannot recover. Now, has there been any actual notice or public notice? Without public notice or actual notice, good faith makes Lovejoy responsible, and he cannot escape if the credit was given to the firm. Angell and Mead were in possession of the property. As to the arrangement with other parties, as testified to, it is not material in this case. One partner can bind the firm in a transaction for the benefit of the firm, and the other partners would be responsible for his acts. In this case, J. B. Shaw accepted these drafts in the name of J. B. Shaw & Co.; and if the credit was given to the firm, and Lovejoy had omitted to do any thing to relieve himself from liability, then he is still responsible."

To the following portions of this charge the defendant duly excepted, and his exception was noted, viz.:—

"If you find that the sale at Reed's was, in fact, made to the firm, and that the plaintiffs, in making such sale, gave credit to the firm of J. B. Shaw & Co., and relied on such credit, then Love-

joy cannot escape liability, unless he has given legal notice of the dissolution of the firm.

"In this case, there is no evidence of any public notice; for private communications made to particular persons at the place where the firm did business, or elsewhere, is not sufficient notice to bind other persons.

"Did the plaintiffs, or their assignees, as in the case of the Mead draft, have reasonable knowledge or information that the firm of J. B. Shaw & Co. still existed at the time the lumber was sold? Knowledge obtained from public notoriety, and from individuals who had knowledge thereof, was sufficient to warrant the plaintiffs in such a belief."

The defendant requested the court to charge the jury as follows: —

"1. The evidence in this case shows that the firm of J. B. Shaw & Co. was dissolved, and that the defendant had withdrawn therefrom on the twelfth day of May, 1870, more than four months before the lumber was purchased from plaintiffs, or their assignees, and the bills of exchange in suit given and accepted.

"2. That, at the time said bills of exchange were given and accepted, said J. B. Shaw had no authority to accept the same in the name of the previous firm so as to bind the defendant by such acceptance.

"3. The evidence shows that none of the persons selling lumber, for which these acceptances were given, had had any dealing with J. B. Shaw & Co., during its existence, and that they were not, at the time said firm was dissolved, entitled to any notice of the dissolution.

"4. When J. B. Shaw applied to purchase the lumber, and represented that he had authority, as partner, to bind the defendant, those having the lumber to sell were bound to inquire as to the fact, whether he had such authority or not in the absence of previous dealings. And, if the fact of the dissolution of the firm was so publicly and generally known that the jury believe that a reasonable inquiry by the persons selling the lumber would have disclosed the fact of the dissolution, and that they neglected to make any reasonable inquiry, the defendant is not bound.

"5. If the jury find that the fact of the dissolution of the firm of J. B. Shaw & Co. was made known to the business men engaged in the same business as those who sold the lumber to Shaw, in the town where they resided and did business, and was so communi-

cated as to be likely to come to their knowledge, the jury may infer that fact, if they believe it, from the evidence and circumstances.

"6. That, as the persons selling the lumber in this case had not had any dealings with the firm of J. B. Shaw & Co., during its existence, they were not justified in presuming that defendant was a member of that firm, on the statement of any one or two persons who are not shown to have ever had any dealing with that firm during its existence.

"7. That, as to persons who had never dealt with the firm of J. B. Shaw & Co., the defendant, on the dissolution of that firm, was not bound to give notice directly of such dissolution. Neither was it absolutely necessary that notice of the dissolution should have been published in any newspaper, in order to protect Lovejoy against persons who had never dealt with the firm. The jury are at liberty to consider, from the generality and extent to which knowledge of the fact of the dissolution had been spread, especially in the vicinity where the plaintiffs and their assignees lived and did business, and from the lapse of time occurring after the dissolution, whether notice of the dissolution had not reached the plaintiffs, or their assignees, or would not have been ascertained upon such inquiry as they were reasonably bound to make.

"8. If the jury believe that the purchase of lumber, by Shaw, was made for his own benefit alone, and this was known to the sellers, or there were circumstances connected with the sale from which they ought to have known this, the defendant is not bound.

"9. That the fact, that Shaw drew the acceptances in his own name, as drawer, is a circumstance which tended to show that the purchase was for his individual benefit, and that the draft, on the face of it, was for his own funds in the hands of the drawee."

In reference to such requests of the defendant, the court charged as asked in the first and the second, with the qualification that it was true if he had given legal notice of the dissolution of the firm, and eighth requests; but as to all the other requests and every of them the court said, "I have already stated to you all the law which I deem applicable to this case, and therefore decline to charge as requested by the defendant," and declined to give any of said requests except the first and second as above, and eighth; and the defendant duly excepted, and his exception was noted, to the refusal of the court to give each of the requests so refused severally.

The jury retired to consider their verdict, and afterwards came into court for further instructions, in response to which the court said, "The first proposition which I charged you was, that there is no dispute that the partnership existed in 1868 and 1869, and that it was in fact dissolved May 12, 1870. So far as Lovejoy is concerned, unless he had done something to bring public or actual notice of the dissolution to these plaintiffs or their assignors, or had given public notice of the dissolution, he would continue liable, and cannot escape, if you are satisfied credit was given to the firm." To all that portion of the charge which follows after the words and figures "May 12, 1870," the defendant duly excepted, and his exception was noted.

The jury returned a verdict in favor of the plaintiffs; judgment was rendered thereon. The defendant then sued out this writ of error.

Argued by *Mr. William Lockren* for the plaintiff in error. Submitted on printed arguments by *Mr. W. O. Bartlett* for the defendants in error.

MR. JUSTICE HUNT delivered the opinion of the court.

The action was by the holder of two drafts dated Sept. 27, 1870, drawn by J. B. Shaw upon J. B. Shaw & Co., and accepted in the name of J. B. Shaw & Co. The object of the action was to charge Lovejoy as a partner. The firm of J. B. Shaw & Co. was formed on the fifteenth day of April, 1868; transacted a lumber business at Davenport, Iowa; and continued until the twelfth day of May, 1870, when it was dissolved by an instrument in writing. In fact, Lovejoy was not a member of the firm of J. B. Shaw & Co., nor was there in existence such a firm when the drafts were accepted in its name. The acceptance in the firm name was a fraud on the part of Shaw.

The questions arising upon the bill of exceptions grow out of the sufficiency of the notice of the dissolution of the firm given by the retiring member.

Formal notice was given to all those who had previously dealt with the firm. It does not appear whether there had been any change of signs, nor whether the firm had any external sign.

No evidence was given that notice of the dissolution was pub-

lished in any newspaper; and it was proved that two daily papers were published in Davenport at the time of the dissolution. After that time the business was carried on in the name of J. B. Shaw alone.

Prior to the present transaction, the plaintiffs, in discounting its paper, had heard of the firm, and who were its members. They testified that they had no information of the dissolution till some time after its occurrence.

The drafts in suit were given for lumber sold by the plaintiffs and by one Mead, were drawn by Shaw, and accepted by him in the name of the firm at Read's Landing, where the lumber was sold.

There was no evidence that the firm had ever had any other transaction at Eau Claire or Read's Landing.

No evidence was given of the relative position of the places in question; but from the maps and gazetteers we learn that Eau Claire is in the interior of the State of Wisconsin, and distant several hundred miles from Davenport, in the State of Iowa. Read's Landing is not far from Eau Claire.

The case was tried by the Circuit Court, upon the theory, that to discharge a member of a firm from the claim of one who had had no dealing with it prior to its dissolution, but who knew of its existence and who were its members, it was necessary that the latter should have received actual notice of the dissolution, or that notice should have been published in a newspaper at the place of business. This doctrine was not announced in terms, but such was the result of the trial. Either of these notices was held to be sufficient; but it was held that, without one of them, the retiring member could not protect himself. In terms, the holding of the judge was, that there must be either actual notice or public notice; and it will be seen from the offers and exclusions presently to be stated, that this public notice could mean only a newspaper publication.

Thus the witness Barnard, after testifying that he had been in business at Davenport prior to May 12, 1870, until the time of the trial; that he had business relations with all the lumber dealers at that place, and knew them all; and that he knew of the dissolution when it occurred, — was then asked whether or

not it was generally known at Davenport at the time the firm was dissolved that such dissolution had taken place.

To which the plaintiffs objected, on the ground that the same was incompetent and immaterial; which objection was sustained, and the defendant Lovejoy excepted, and his exception was noted.

Defendants' counsel then asked the witness: "State whether or not it was generally known at this time along the river that this dissolution had taken place."

To which plaintiffs made the same objections as before; and the objection was sustained, and an exception taken by defendant Lovejoy, and noted.

Defendants' counsel then asked the witness: "Did you at or near the time of the dissolution communicate the fact that it had occurred to any persons other than the plaintiffs; and, if so, to whom, and in what manner?"

To which the plaintiffs made the same objection as before; which objection was sustained, and an exception was taken and noted for the defendant Lovejoy.

Counsel for defendant Lovejoy stated, in connection with the questions to the witness Barnard, that he did not expect to prove actual notice of the dissolution to the plaintiffs, or to the persons who sold the lumber.

John C. Spetzler was sworn as a witness in behalf of the defendant, and testified that in May, 1870, he was in the employment of J. B. Shaw & Co., in their yard at Davenport, as salesman; that the business was conducted after the dissolution by Shaw, in the name of J. B. Shaw.

The defendant proposed to prove by the witness that the dissolution, immediately upon its occurrence, was a matter of general repute and knowledge in the city of Davenport, where the firm did business, and that all lumber dealers in Davenport were informed of it.

To which plaintiff objected, on the grounds that the same was incompetent and immaterial; which objection was sustained. To which the defendant Lovejoy excepted, and his exception was noted.

Sumner W. Farnham, not a partner, was sworn on behalf of the defendant, and testified, that, in September, 1870, and

before the transaction in question, he visited Eau Claire in company with J. B. Shaw; was there two or three days, and called on the lumber dealers of that place. The witness was then asked whether on that occasion he or Shaw gave any notice to the lumber dealers at Eau Claire of the dissolution of the firm of J. B. Shaw & Co. If so, to whom, and in what manner?

To which the plaintiffs objected, on the grounds that the same was incompetent and immaterial, unless the defendant proposed to prove actual notice to plaintiffs, or to those who sold the lumber, or notice by publication in a newspaper. The objection was sustained by the court; and the defendant Lovejoy excepted, and his exception was noted.

The defendant then offered to prove by this witness, that, while he and Shaw were at Eau Claire on this occasion, and before the sale of the rafts in question, the said Shaw, in the presence of the witness, notified all, or nearly all, of the lumber dealers in Eau Claire, where plaintiffs then lived and did business, and in the vicinity, that the firm of J. B. Shaw & Co. had dissolved, and that Farnham & Co. had sold out to Shaw.

To which the plaintiffs objected, on the grounds that the same was immaterial and incompetent, unless the defendant proposes to show actual notice to the plaintiffs, or to those who sold the lumber; which objection was sustained, and the defendant Lovejoy excepted, and his exception was noted.

In *Pratt* v. *Page*, 32 Vt. 11, cited as an important case, it was held, that, to entitle a plaintiff to recover in a case like the present, these facts must appear: 1. The claimant must have known at the time of making his contract that there had been a partnership. 2. That he did not then know of its dissolution. 3. That he supposed he was entering into a contract with the company when he made it. In the court below the plaintiff recovered, on the ground of want of sufficient notice of dissolution; but in the appellate court that question was not reached.

In *City Bank of Brooklyn* v. *McChesney*, 20 N. Y. 240, the bank having had previous knowledge of the existence of the firm of Dearborn & Co., of which the defendant, McChesney, was a member, discounted a note made in the firm name, but after the partnership was in fact dissolved, without knowledge

or information on the part of the bank; it was held, there being no publication of dissolution, that the retiring partner was liable. The court makes no examination of the law, but adopts as the basis of its judgment the opinion of Senator Verplanck in *Vernon* v. *Manhattan Company*, 22 Wend. 183.

In that case, Senator Verplanck made use of this language: "Now, following out this principle, how is a person, once known as a partner, to prevent that inducement to false credit to his former associates which may arise after the withdrawal of his funds, from the continued use of the credit which he assisted to obtain? How shall he entitle himself to be exempted from future liability on their account? The natural reply is, He must take all the means in his power to prevent such false credit being given. It is impossible for him to give direct notice of his withdrawal to every man who may have seen the name of his former firm, or have accidentally received its check or note. No man is held to impossibilities. But he does all he can do in such a case by withdrawing all the exterior indications of partnership, and giving public notice of dissolution in the manner usual in the community where he resides. He may have obtained credit for his copartnership by making his own interest in it known, through the course of trade. So far as those are concerned who have had no direct intercourse with the firm, he does all that is in his power to prevent the continuance and abuse of such credit, if he uses the same sort of means to put an end to that credit which may have caused it. But there are persons with whom he or his partners may have transacted business in the copartnership name and received credit from. To such persons he has given more than a general notice of the partnership; for he has directly or indirectly ratified the acts of the house, and confirmed the credit that may have been given, either wholly or in part, upon his own account. He knows, or has it in his power to know, who are the persons with whom such dealings have been had. Public policy, then, and natural justice, alike demand that he should give personal and special notice of the withdrawal of his responsibility to every one who had before received personal and special notice, either by words or acts, of his actual responsibility and interest in the copartnership. Justice requires that the severance of

the united credit should be made as notorious as was the union itself. This is accomplished by the rule that persons having had particular dealings with the firm should have particular notice of the dissolution or alteration, but that a general notice, by advertisement or otherwise, should be sufficient for those who know the firm only by general reputation." Both the Senator and the Chancellor, and the court in McChesney's case, agree in the opinion that persons who merely take or receive for discount the paper of a firm are not to be deemed dealers with the firm, so as to be entitled to actual notice.

In *Bristol* v. *Sprague*, 8 Wend. 423, which was an action against a retired partner upon a note made after the dissolution, Nelson, J., says, "It is well settled that one partner may bind another after dissolution of the firm, if the payee or holder of the note is not chargeable with notice, express or constructive, of the dissolution of the partnership (6 Johns. 144; 6 Cowen, 701); and that such notice must be specially communicated to those who had been customers of the firm, and as to all others by publication in some newspaper in the county, or in some other public and notorious manner."

In *Ketcham* v. *Clark*, 7 Johns. 147, Van Ness, J. said, "In England, it seems to be necessary that notice should be given in a particular newspaper, the 'London Gazette;' but we have no such usage or rule here. I think, however, we ought at least to go so far as to say that public notice must be given in a newspaper of the city or county where the partnership business was carried on, or in some other way public notice of the dissolution must be given. The reasonableness of it may, perhaps, become a question of fact in the particular case."

Mr. Parsons, in his Treatise on Partnership, pp. 412, 413, gives this rule: "In respect to persons who have had dealings with the firm, it will be necessary to show either notice to them of a dissolution or actual knowledge on their part, or at least adequate means of knowledge of the fact. As to those who have not been dealers, a retiring partner can exonerate himself from liability by publishing notice of the dissolution, or by showing knowledge of the fact." He adds: "A considerable lapse of time between the retirement and the contracting the new debt, would, of course, go far to show that it was not, or

should not have been, contracted on the credit of the retiring partners."

Mr. Justice Story, in his work on Partnership, says, the retiring partner "will not be liable to mere strangers who have no knowledge of the persons who compose the firm, for the future debts and liabilities of the firm, notwithstanding his omission to give public notice of his retirement; for it cannot be truly said, in such cases, that any credit is given to the retiring partner by such strangers." Sect. 160. In a note he discusses the doctrine as laid down by Bell and Gow, and adheres to the rule as above announced.

Mr. Watson says, that to dealers actual notice must be given; as to strangers, he says, "An advertisement in the 'London Gazette' is the most usual and advisable method of giving notice of a dissolution to the public at large." Watson on Part. 385.

In his Commentaries on the Law of Scotland, Professor Bell, in speaking of a notice to dealers, says, "An obvious change of firm is notice; for it puts the creditor on his guard to inquire, as at first. So the alteration of checks or notes, or of invoices, is good notice to creditors using those checks and invoices." As to notices to strangers, he says, "As it is impossible to give actual notice to all the world, the law seems to be satisfied with the 'Gazette's' advertisement, accompanied by a notice in the newspaper of the place of the company's trade, or such other fair means taken as may publish as widely as possible the fact of dissolution." The "Gazette" notice he holds to be one circumstance to be left to the jury. 2 Bell's Com. 640, 641.

In *Wardwell* v. *Haight*, 2 Barb. S. C. 549, 552, Edmonds, J., says, "The notice must be a reasonable one. It need not be in a newspaper. It may be in some other public and notorious manner. But whether in a newspaper or otherwise, it must, so far as strangers and persons not dealers with the firm are concerned, be public and notorious, so as to put the public on its guard."

In view of these authorities, we are of the opinion that the rule adopted by the judge on the trial of this cause was too rigid. We think it is not an absolute, inflexible rule, that there must be a publication in a newspaper to protect a retiring partner. That is one of the circumstances contributing to or

forming the general notice required. It is an important one; but it is not the only or an indispensable one. Any means that, in the language of Mr. Bell, are fair means to publish as widely as possible the fact of dissolution; or which, in the words of Judge Edmonds, are public and notorious to put the public on its guard; or, in the words of Judge Nelson, notice in any other public or notorious manner; or, in the language of Mr. Verplanck, notice by advertisement or otherwise, or by withdrawing the exterior indications of partnership and giving public notice in the manner usual in the community where he resides, — are means and circumstances proper to be considered on the question of notice.

When, therefore, the defendant proved that actual notice had been given to all those who had dealt with the firm; that all subsequent business was carried on in the name of the remaining partner only, thus making a marked change in the presentation of the firm; when the claimants received and obtained the draft at a distance of several hundred miles from the place where the firm did business, and there was no evidence that the firm had ever before transacted any business in that place, — we think the evidence offered should not have been excluded. When the defendant offered to prove that it was generally known along the Mississippi River that the dissolution had taken place, and offered evidence showing to whom, to what extent, and in what manner, notice had been given; that all the lumber dealers in Davenport were notified and knew of the dissolution; that at Eau Claire, on the occasion of the transaction in question, and before the drafts were made, notice was there given to all, or nearly all, of the lumber dealers in that place that the firm had been dissolved, — we think the evidence was competent to go before the jury.

The question is not exclusively whether the holders of the paper did in fact receive information of the dissolution. If they did, they certainly cannot recover against a retired partner. But if they had no actual notice, the question is still one of duty and diligence on the part of the withdrawing partner. If he did all that the law requires, he is exempt, although the notice did not reach the holders. The judge held peremptorily that there must be either actual notice or public notice, — in

effect, that it must be through a newspaper, — and excluded other evidence tending to show a public and notorious disavowal. In this we think he erred.

He refused to admit evidence which would have sustained the fifth request to charge, that, if the notice was so generally communicated to the business men of Eau Claire as to be likely to come to the claimants' knowledge, the jury are at liberty to find such knowledge. In this we think he erred.

Without prescribing the precise rule which should have been laid down, we are of the opinion that the errors in the rulings were of so grave a character that a new trial must be ordered.

New trial ordered.

LAKE SUPERIOR AND MISSISSIPPI RAILROAD COMPANY *v.* UNITED STATES.

ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD COMPANY *v.* UNITED STATES.

1. A provision in an act of Congress, granting lands to aid in the construction of a railroad, that "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States," secures to the government the free use of the road, but does not entitle the government to have troops or property transported over the road by the railroad company free of charge for transporting the same.
2. Where, throughout an act of Congress, a railroad is referred to, in its character as a road, as a permanent structure, and designated, and required to be, a public highway, the term "railroad" cannot, without doing violence to language, and disregarding the long-established usage of legislative expression, be extended to embrace the rolling-stock or other personal property of the company.

APPEALS from the Court of Claims.

The first case was argued by *Mr. Walter H. Smith* for the appellant, and by *Mr. Solicitor-General Phillips* for the appellee. The second case was argued by *Mr. Thomas H. Talbot* and *Mr. E. R. Hoar* for the appellant, and by *Mr. Solicitor-General Phillips* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Congress, in most of the legislative acts by which it has made donations of the public lands to the States in which they lie for the purpose of aiding in the construction of railroads, has stipulated that the railroads so aided shall be public highways for the use of the government, free from all tolls or other charge for transportation of its property or troops. The question has arisen between the railroad companies owning these roads and the officers of the government, whether this reservation includes the free use of the roads alone, or transportation also. The companies claim, that, if they give to the government the free use of their roads, it is all that is required of them. The government claims that it is entitled to have free transportation on the roads, and that it is the duty of the companies to perform it; and Congress has refused compensation for such transportation, giving the companies, however, the right to appeal to the Court of Claims. That court having been applied to, and having decided adversely to the companies, they have appealed to this court, and the cases are now before us for consideration.

The manner in which the question arises is stated with sufficient accuracy by the counsel of one of the appellant companies, as follows: —

"Was the plaintiff, by reason of being a land-grant railroad, bound to transport the troops and property of the United States, free of charge, or had she a right to a reasonable compensation for such services. . . .

"The act of May 5, 1864 (13 Stat. 64), made a grant of land, in the usual form, to the State of Minnesota, to aid in the construction of plaintiff's road. That act contained the following provisions: 'And the said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge for [upon] the transportation of any property or troops of the United States.' Sect. 5, p. 65. The seventh section provides, —

"'That the United States mail shall be transported over said road, under the direction of the Post-Office Department, at such price as Congress may, by law, direct: *Provided*, that, until such price is fixed by law, the Postmaster-General shall have the power to determine the same.'

"By the act of Congress of June 16, 1874 (18 Stat. 74), making appropriations for the army for the fiscal year ending June 30, 1875, it was provided, 'That no part of the money appropriated by this act shall be paid to any railroad company for the transportation of any property or troops of the United States over any railroad which, in whole or in part, was constructed by the aid of a grant of public land, on the condition that such railroad should be a public highway for the use of the government of the United States, free from toll or other charge, or upon any other conditions for the use of such road for such transportation; nor shall any allowance be made out of any money appropriated by this act for the transportation of officers of the army over any such road when on duty, and under orders, as a military officer of the United States. But nothing herein contained shall be construed as preventing any such railroad from bringing a suit in the Court of Claims for the charges for such transportation, and recovering the same, if found entitled thereto by virtue of the laws in force prior to the passage of this act.' . . .

"The case turns upon the construction that should be given to the clause in the act of 1864, which declares that 'the said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge for [upon] the transportation of any property or troops of the United States.'"

And the counsel for the appellants analyzes this provision as follows: —

"This is a legislative declaration of three things: 1. That *the railroad* shall be a public highway. 2. That the United States shall have the right to use the same for the transportation of its troops and property. 3. That the United States, in the transportation of its troops and property over such railroad as a public highway, shall not be required to pay toll or other charge."

It is somewhat singular that a provision apparently so simple in its terms should give rise to such a wide difference of opinion as to its true construction. The difficulty arises from the peculiar character of a railway as a means of public travel and transportation. The case of a turnpike or a canal would have furnished no difficulty whatever. Those thoroughfares are usually constructed and owned by companies who have nothing to do with transportation thereon. They merely furnish

the thoroughfare. Had the provision in question related to public works of this kind, it would have been clear that the right reserved to the government would have been merely the right to use the works themselves (the turnpike or the canal) free from toll. The words "free from all toll or other charge for the transportation of property or troops" would have referred, by necessary implication, to transportation performed by the government itself, either in its own carriages or vessels, or in carriages or vessels procured and employed at its expense. No one would imagine for a moment that the turnpike or canal company would be bound to furnish the means of transportation, much less the propelling power and labor for performing it.

Indeed, Congress has, in several instances, commencing as far back as 1824, made donations of right of way, or grants of land, for canals and turnpikes, and has made almost the exact reservation contained in the railroad grants. The first was that made May 26, 1824, authorizing the State of Indiana to connect the Wabash River with the Miami of Lake Erie; and the reservation was in these words: "*And provided further*, that the said canal when completed shall be and for ever remain a public highway for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service in public business, passing through the same." 4 Stat. 47.

On the 2d of March, 1827, an act, with precisely the same reservation, was passed, making a grant of land to the State of Illinois, to aid in opening a canal to unite the waters of the Illinois River with those of Lake Michigan. 4 Stat. 234. On the 2d of March, 1833, an amendment to this act was passed, which declared "that the lands granted to the State of Illinois, by the act to which this is an amendment, may be used and disposed of by said State for the purpose of making a railroad, instead of a canal, as in said act contemplated; . . . *Provided*, that if a railroad is made in place of a canal, the State of Illinois shall be subject to the same duties and obligations, and the government of the United States shall be entitled to and have the same privileges on said railroad, which they would have had through the canal if it had been opened." Evidently the only thing reserved in this case was the use of the road.

It will be observed that the last-cited act was passed in 1833, when railroads were about being introduced as means of public communication in this country. It is undoubtedly familiar to most of those whose recollection goes back to that period, that railroads were generally expected to be public highways, on which every man who could procure the proper carriages and apparatus would have the right to travel. This was the understanding in England, where they originated. The Railway Clauses Consolidation Act, passed in 1842, provided in detail for the use of railways by all persons who might choose to put carriages thereon, upon payment of the tolls demandable, subject to the provisions of the statute and the regulations of the company. Acts of 5 & 6 Vict. c. 55. And suits were sustained to compel railway companies to keep up their roads for the use of the public. *King* v. *Severn R. Co.*, 2 B. & A. 646; *Queen* v. *Grand Junction*, 4 Q. B. 18; 2 Redf. sect. 249; Pierce's American Railway Law, 519. Most of the early railroad charters granted in this country were framed upon the same idea. Thus the charter of the Mohawk and Hudson Railroad Company, granted by the legislature of New York in 1826 (which was one of the earliest), after giving the company power to construct the road, provided as follows: —

"And shall have power to regulate the time and manner in which goods and passengers shall be transported, taken, and carried on the same, as well as the manner in which they shall collect tolls and dues on account of transportation and carriage, and shall have power to erect and maintain toll-houses and other buildings for the accommodation of their concerns." Laws of 1826, p. 289.

In subsequent charters, granted in 1828 and succeeding years, the intent is still more plainly expressed. Thus, in the charter of the Ithaca and Owego Railroad Company, it is provided: —

"Sect. 9. The said corporation shall have power to determine the width and dimensions of the said railroad; to regulate the time and manner in which goods and passengers shall be transported thereon; and the manner of collecting tolls for such transportation; and to erect and maintain toll-houses, &c. Sect. 11. The said corporation may demand and receive from all persons using or travelling upon said rail the following tolls; to wit, for every ton weight

of goods, &c., three cents per mile for every mile the same shall pass upon the said road, and a ratable proportion for any greater or less quantity; for every pleasure-carriage, or carriage used for the conveyance of passengers, three cents per mile, in addition to the toll by weight upon the loading. Sect. 12. All persons paying the toll aforesaid may, with suitable and proper carriages, use and travel upon the said railroad, subject to such rules and regulations as the said corporation are authorized to make by the ninth section of this act." Laws of 1828, p. 17.

Substantially the same provisions were contained in other charters granted in 1828 and 1829. Laws of 1828, pp. 197, 228, 296, 307, 403, 474; Laws of 1829, p. 252. In 1830 and subsequent years, an abbreviated formula was employed, but still apparently recognizing the possible use of the roads by the public; giving, amongst other things, express power to regulate the time and manner in which goods and passengers should be transported thereon, and power to erect toll-houses, &c. So in the early charters granted by the legislature of Massachusetts, it was usual, after granting a toll upon all passengers and property conveyed or transported upon the road, to provide that the transportation of persons and property, the construction of wheels, the form of cars and carriages, the weight of loads, &c., should be in conformity to such rules, regulations, and provisions as the directors should prescribe, and that the road might be used by any persons who should comply with such rules and regulations. This formula was continued down to 1835. See 2 Railroad Laws and Charters, pp. 41, 60, 67, 77, 95, 103, 117, 124, 132, 141, 166, 195, 215. Like provisions were inserted in various charters granted by the legislature of Maine, some as late as the year 1837; and in 1842 a general law was passed, requiring every railroad company whose road should be connected with that of another company to draw over their road the cars of such other company; and, on refusal so to do, the latter company was authorized to run its cars, with its own locomotives over such road, being subject to the general regulations thereof. See 1 id. 8, 22, 60, 63, 77, 310. Similar provisions as to the use of railroads by the public are contained in several early charters granted by the legislature of New Hampshire, coming down to a period as late as 1844.

Id. 325, 335, 343, 364, 378, 411. In that year a statute was passed, entitled "An Act to render railroad corporations public in certain cases," &c., by one section of which it was provided, that said corporations, whenever thereto required by the legislature, should permit all persons to run locomotives and cars on their road. Id. p. 648.

In New Jersey, not only did the railroad charters contain provisions similar to those above quoted with regard to the authority of the directors to regulate the construction of carriages to be used on their roads, the weight of loads to be carried, the times of starting and the rate of speed, but expressly declared that such roads should be public highways. See Charter of Camden and Amboy Railroad Company, Feb. 4, 1830. The charter of the New Jersey Railroad, passed in 1832, distinguished between tolls for transportation in the cars of the company and those of other persons; and provided that no farmer should be required to pay any toll for the transportation of the produce of his farm to market in his own carriage, weighing not more than one ton, when the load did not exceed one thousand pounds.

The charter of the Philadelphia and Trenton Railroad Company, granted by the legislature of Pennsylvania in 1832, expressly made the road a public highway, and contained various provisions adapted to a road of that character; and no doubt similar provisions were contained in other charters granted in that State.

In the case of *Boyle* v. *Philadelphia and Reading Railroad Company*, 54 Penn. 310, decided in 1867, the Supreme Court of Pennsylvania held that the charter of the latter company made the road a public highway, on which all persons might place vehicles of transportation on conforming to the regulations of the company; and that in limiting the amount of "tolls" demandable for transportation on the road, the legislature had reference to "tolls" charged to other parties using the road, and not to the freights or charges for transportation which the company itself was authorized to demand when performing transportation.

In Missouri, as late as the year 1847, the legislature, when incorporating the Hannibal and St. Joseph Railroad Company,

subjected it to the same restrictions and gave to it the same privileges before imposed and conferred on the Louisiana and Columbia Railroad Company, created in 1837; amongst which was the following: namely, "that the company should have power to prescribe the kind of carriage to be used on its road, by whom, whether to be propelled by steam or other power, all cars being subject to the discretion of the company, and no person to put any carriage on the road without its permission; and the company was authorized to charge tolls and freight for the transportation of persons, commodities, or carriages on the road; and it was declared that the State and the United States should have the right, in time of war, to use said road in transportation of troops or munitions of war in preference to all other persons." Missouri Railroad Laws, pp. 8–13. In reference to this railroad (among others), Congress, in 1852, made a grant of land to the State of Missouri, with the same reservation now under consideration, "that the said railroads shall be and remain public highways for the use of the government of the United States," &c. 10 Stat. 9. Read in connection with the charter of the railroad, which the rule relating to laws *in pari materia* requires, it is certain that, in this case at least, the reservation has relation to the use of the railroad alone, and not to the transportation service of the company.

On the other hand, in Maryland, from the first railroad charter granted in 1826, — namely, that of the Baltimore and Ohio Railroad Company, — the legislature has prohibited the use of railroads by any other company or person than the companies owning the same, except with their consent. But even this legislation is a recognition of the distinction between the railroad considered as a structure adapted to general use, and its actual use by placing vehicles and conducting transportation thereon. See Laws of Md. 1826, c. 123, sect. 18, and charters in subsequent years in the Session Laws.

It is undoubtedly true, that, in practice, railroads, as a general thing, are only operated by the companies that own them, or by those with whom they have permanent arrangements for the purpose. These companies have a practical, if not a legal, monopoly of their use. The great expense of constructing and

managing cars and motive power fit to be used on railroads as they have actually developed, the difficulty of strict compliance with the regulations adopted, and the diversified ways in which the companies could make the transportation business uncomfortable to those who might attempt to carry it on, are a most effectual security against any interference with their business as carried on by themselves. And in some of the States where railroads were originally declared public highways, the right of the public to use them has been expressly abrogated, — as in Massachusetts, for example, by the act of 1845. See Railroad Laws and Ch. 648.

But the ascertained impracticability of the general and indiscriminate public use of these great thoroughfares does not preclude their use by transportation companies having no interest in the roads themselves. Such companies, in fact, are actually engaged in conducting a vast carrying business on the principal lines of railroad throughout the country. Nor does it preclude the idea, that it may be of great importance to the government, in conducting its various operations in peace and in war, to have the free use of railroads as thoroughfares whenever it chooses to assume the conduct and management of its own transportation thereon.

Be this, however, as it may, the general course of legislation referred to sufficiently demonstrates the fact, that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name. This view pervaded the language of most charters granted at that period, many of which still remain in force; and the railroads constructed under them are, theoretically at least, public highways to this day. This fact affords the only explanation of much of the language used, not only in those early charters, but in many of those which have been granted since, the latter adopting, as was natural, the forms of phraseology found prepared to hand. The language referred to is only consistent with the idea that railroads were to be regarded and used as public highways. The forms of legislative expression thus adopted, and coming down from a period when they had greater practical significance than they now have, bring with them an established sense, which renders them free from all uncertainty and doubt. We

know, as well as we know the sense of any phrase in the English language which has a historical meaning and application, what is meant when a railroad is spoken of in a law as a "public highway." We know that it refers to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars.

But it is not alone in charters which contemplate the creation of railroads as public highways that we find evidence of the understood distinction between railroads as mere thoroughfares, and the operations to be carried on upon them by means of locomotives and cars. This is manifest from the fact, amongst other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon and charge compensation therefor. This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that, to make it such, express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication.

In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and that when Congress, in granting lands in aid of such a road, declared that the same shall be and remain a public highway for the use of the government of the United States, it only means that the government shall have the right to use the road, but not that it shall have the right to require its transportation to be performed by the railroad company. And when this right of the use of the road is granted "free from all toll or other charge for transportation of any property or troops of the United States," it only means, that the government shall not be subject to any toll for such use of the road. This, we think, is the natural and most obvious meaning of the language used, when viewed in the light afforded by the history of railroad legislation in this country.

This was also the interpretation put by the Executive De-

partment of the government upon the reservation in question prior to the passage of the acts of 1864. At the breaking out of the late civil war, it became a matter of great practical importance to the railroad companies which had received grants of land subject to this restriction, whether they were or were not to receive any compensation for transporting government property and troops in their cars. It was held that they were, and that a reasonable abatement should be made for the free use of the road, to which the government was entitled. The views of the War Department were set forth in a communication from Mr. Cameron, Secretary of War, to the president of the Illinois Central Railroad Company, dated Aug. 15, 1861, in which he says, "It has been decided by this department that the clause in your charter (9 Stat. 467, sect. 4) gives a clear right to the government of the United States to the use of your roadway, without compensation, for the transportation of its troops and its property. As a proper compensation for motive power, cars, and all other facilities incident to transportation, two cents per mile will be allowed for passenger travel, subject to a discount of thirty-three and a third per cent as due to government for charter privileges. Payment for transportation of freights, stores, munitions of war, and other public property, will be made at such reasonable rates as may be allowed railroad companies, subject, however, to the abatement of thirty-three and a third per cent, as before specified." A movement to compel the same company to transport property for the government free of charge was made in 1865; but was reported against adversely by learned committees, after receiving from the War Department a full explanation of the reasons upon which its action had been based. See letter of Q. M. Gen. Meigs to Senator Sherman, dated Feb. 14, 1865, and the action of the Senate and House of Representatives, 2d Sess. 38th Congress, Cong. Globe, vol. lxviii. pp. 890–902, 1045, 1387–1389. The same views were fully expressed by the Attorney-General, when applied to for his opinion, in 1872. 14 Opinions, 591. In accordance with these views, settlements were made with the different companies concerned down to the passage of the act of 1874, suspending payment, as before stated.

It is not without significance, in this connection, that in other grants, when Congress intended to provide for transportation being performed by the railroad company, explicit and proper language is used for that purpose. As in the case of the Union Pacific Railroad Company, chartered by Congress July 1, 1862, where it is enacted that the company shall transmit despatches over its telegraph lines, transport mails, troops, and munitions of war, supplies, and public stores, upon its railroad, for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service. 12 Stat. 493. In this case compensation was provided for. In other cases the transportation was to be furnished without charge. After the discussion in 1865, before referred to, Congress made several grants of land, with the express reservation that the government property should be transported over the roads concerned at the cost, charge, and expense of the company owning and operating the same, when required by the United States so to do, using language entirely different from that under consideration in the cases now before the court. See acts of 1866 (14 Stat. 95, 237, 241, 290, 338, 549).

But suppose, in the cases under consideration, the States of Kansas and Minnesota, to which the land-grants were directly made, had themselves severally chosen to construct the railroads in question, to be operated and used by any individuals or transportation corporations who might see fit to place rolling-stock thereon upon payment of the proper tolls, would the government have had any further right than that of using the road with its own carriages free of toll? It certainly could not have the right to use the carriages of third persons placed on the road; nor, from any thing contained in the act of Congress, could it require that the State should procure and place rolling-stock on the road. All that the act reserves is the free use of the railroad. Of course this implies, also, the free use of all fixtures and appurtenances forming part of the road, and which are essential to its practical use, such as turn-

tables, switches, dépôts, and other necessary appendages. Lord Chancellor Cottenham, in the case of *Cother* v. *The Midland Railway Company*, 2 Phill. 473, said, "The term 'railway,' by itself, includes all works authorized to be constructed; and, for the purpose of constructing the railway, the company are authorized to construct such stations and other works as they may think proper." 1 Redf. on Railw., sect. 105. The "works" referred to by the Lord Chancellor were those permanent and immovable appendages which constitute parts of the completed structure.

We are of opinion that the reservation in question secures to the government only a free use of the railroads concerned, and that it does not entitle the government to have troops or property transported by the companies over their respective roads free of charge for transporting the same.

In coming to this conclusion, we do not place any great stress upon the use of the word "toll," as being a word peculiarly applicable to charges for the use of a highway, as contradistinguished from the charge for transportation, which is more properly denominated "freight;" for whilst this is undoubtedly true, it must be conceded, that, in the actual language of railroad legislation, the word "toll" is very often used to express the charge for transportation also. Our opinion is based rather upon that marked distinction which the mind naturally makes, and which is so generally made in railroad legislation between the road as a thoroughfare and the transaction of the carrier business thereon, whether by the railroad company itself or by other persons, and the manifest intent of Congress, in the legislation under review, to reserve only the free use of the road, and not the active service of the company in transportation.

The objection that it would be inconvenient for government to provide locomotives and cars for the performance of its transportation cannot be properly urged. The government can do what it always has done, without experiencing any difficulty, — employ the services of the railroad and transportation companies which have provided these accommodations. It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and

on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable.

Equally untenable is the idea, that, because railways are not ordinarily used as public highways, therefore the appellation of "public highways," when given to them, must mean something different from what it has ever meant before, and must embrace the rolling-stock with which they are operated and used. Such a method of interpretation would set us all at sea, and would invest the courts with the power of making contracts, instead of the parties to them. It is contended by the government, that though it be not entitled to the active services of the company, but only to the use of the "railroad," that, at least, this term (railroad) must be regarded as including the equipment of the road as a part thereof, and that the government should be adjudged to have the free use of the locomotives and cars of the company, as well as the track. But, as suggested, we cannot see any good reason for this position. No doubt the word, as used in certain connections and in particular charters and instruments, may properly have a wider latitude of signification, so as to include the equipment and rolling-stock as accessory to the track, constituting together one incorporated mass or *corpus* of property as the subject-matter of the particular enactment or disposition. It is not our purpose to question the propriety of this view in the cases and for the purposes to which it may be applicable. But where, as in the laws under review, the railroad is referred to throughout in its character as a road, as a permanent structure, and designated and required to be a "public highway," it cannot, without doing violence to language, and disregarding the long-established usage of legislative expression, as shown in the previous part of this opinion, be extended to embrace the rolling-stock or other personal property of the railroad company.

The decrees of the Court of Claims in the several cases must be reversed, and a new decree made in favor of the respective petitioners, in conformity with the principles of this opinion; that is to say, awarding to each of them compensation for all transportation performed by them respectively of troops and property of the government (excepting the mails), subject to a fair deduction for the use of their respective railroads.

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE CLIFFORD, MR. JUSTICE SWAYNE, and MR. JUSTICE DAVIS, dissenting.

I propose to state briefly the reasons why I cannot concur in the judgment of the court in these cases.

The grants of lands to these railroads are of great value, and were made before a single dollar was expended in their construction, and were so necessary to the success of these enterprises, that it may be safely assumed that the roads would not have been built without them.

The only compensation, which can properly be so called, to the United States, is found in the following proviso to the third section of the grant to the Atchison, Topeka, and Santa Fé Railroad Company: "The said railroad and branches shall be and remain public highways for the use of the government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States." 12 Stat. 773. This act was passed in 1863; and a grant to the other company, passed in 1864, contained a proviso in the same words, with the substitution of the word "for" in place of the word "upon" preceding the word "transportation."

The only question in these cases is, What right or privilege did Congress intend to secure to the government by this proviso?

Notwithstanding the argument, built upon the assertion that railroads in England were first used as other roads by the persons who used them furnishing their own vehicles of transportation, and, perhaps, motive power, and that there may possibly exist at this day one or two short railroad tracks connecting coal-mines with other railroads, on which each mining company furnishes its own cars and locomotives, I venture the assertion, that there does not now exist in the United States, and has not ever existed, any railroad track over which the general public actually ran, each man for himself, his own cars propelled by his own locomotives, and managed and controlled by his own conductors, engineers, brakesmen, &c. In short, I deny that at the date of these grants there was in existence any practicable system anywhere in the United States by which the government or any one else could use the track of a railroad,

without using its usual and necessary appurtenances; namely, its cars, locomotives, dépôts, agents, officers, and servants. I will not discuss the proposition, because its truth or falsehood is open to the observation and experience of all men who know any thing of the present railroad system of the world.

It follows, that if the United States secured any thing by the proviso, the use of the road by the government, for which no toll or other charge was to be made, must be the only use which is at all practicable, and the same use which is made of it by all others who have occasion to employ it.

Nothing is gained in the argument by the criticism on the phrase, "public highway for the use of the government." Railroads, such as we have described them, and limited in the manner of their use to their own rolling-stock, managed by their own officers, are, if not technically so, really public ways. They exist nowhere except by statutory authority of the government. They would not be tolerated for a moment in any State of the Union, unless they were free in some mode of use to all the public. They no more dare to refuse to transport persons and property of the general public over the whole or any part of their road, than a ferryman would refuse to do the same thing over his ferry.

They have received grants, corporate subscriptions, and municipal gifts, on the ground that they are for the public use, which could be valid on no other ground. *Loan Association* v. *Topeka*, 20 Wall. 661. And they are subject to such legislative regulations as are ferries, bridges, turnpikes, and other public means of conveyance and transportation, where they have secured no restriction on this legislative power either by contract or by constitutional provision.

The words "public highways for the use of the government" only express that the roads are to be open to the use of the government as to others, and are introductory to the modification of the terms on which this use is by the contract conceded to the United States; namely, that it is to be "free of toll or other charge upon the transportation of any property or troops of the United States."

Much stress in the argument of counsel is laid upon the word "toll," which, it is said, is inapplicable in any other sense than

a charge for the use of the road-bed. If we should concede this, it would advance the argument but little; for the use of the road is to be free from toll or other charge on transportation. Now, what is suit brought for in these cases but for a charge for transportation, — a charge upon transportation by these companies? If it is not a toll, it is another charge for transportation. If it is a toll, it is equally to be free.

But the word "toll" has never been restricted to the limited sense here contended for.

In 6 Com. Dig. 349, art. "Toll" a "toll thorough," which is the class of tolls relating to ways, is said to be "a sum demanded for a passage through a highway or for a passage over a ferry." In the case of the ferry, it surely will not be said that the toll is for the use of the river; nor will it be denied that it is for transportation over the river by means of the ferryman's boat, his labor, and if it be in a steamboat, it is the very class of means used by a railroad company. A "toll thorough," then, as understood at the common law, did include compensation for something more than the use of a road-bed or a water-way, and did include, when applied to a proper case, compensation for the means of locomotion and transportation used by the party who claimed the right of toll.

So, also, "toll" is the word used to express the compensation allowed by law or custom to a miller for grinding grain. 2 Bouv. Law Dict. 598. Now, the motive power of ancient mills in England was principally the water of rivers or other streams, and the owner of the grain did nothing but to bring his grist to the mill and carry it away. It is true that in this country there is, and has been, a class of mills run by horse-power, where the owner of the grain furnished the horses, and the other party the mill; and in these, also, the compensation is called by both statutes and customs, "toll." These instances are sufficient to show that neither by the common law of England, by its statutes, nor by customary usage there or in the United States, is the word "toll" limited to compensation for the use of a road, a way, a mill, or a ferry, where the moving power comes from the party using it; but, on the contrary, that it is and always has been applied to compensation for such use when the thing used, and the motive power by which it was used,

came from the party charging the toll, as well as when it came from the party paying it.

It is, therefore, a word properly used to express the charges made by railroad companies for transportation of persons and property in the manner which is now usual, and, I may add, universal.

We are seeking to ascertain the meaning which the Congress of the United States attached to a certain form of words; and if that body had, before the use of the words in the two statutes which we are construing, made any public and official declaration of the sense in which they used them, both the grantees in these later statutes, and this court, must be bound by that declaration.

The form of proviso under consideration had been adopted in many previous grants of land for railroad and other purposes; among others, in 1852, to the State of Missouri, for the Hannibal and St. Joseph and the Pacific Railroad.

Upon the outbreak of the rebellion these roads suffered very much from the intestine war of the State, and were called upon almost beyond the extent of their ability for transportation of troops, food, and munitions of war, for the government of the United States. It was found that if they were to do all this without compensation they would soon be bankrupt, and had better abandon their property to the government.

In view of this great hardship, unanticipated by any one at the date of their grants, Congress made provision by the joint resolution of March 6, 1862 (12 Stat. 614), for an equitable arrangement by which the companies could discharge some portion of their obligation, and yet receive from the government such compensation, during the existence of the war, and in view of the public exigency, as might be just and reasonable. But the preamble declared, that in doing this they did not waive the right of the United States to have their property and troops transported free from toll or other charges of said railroad, as contemplated by the provisions of the grant already referred to.

Here was, in 1862, — the year before the first of the grants under consideration was made, and two years before the other, — a declaration by Congress, placed on the statute-book, that

they understood and claimed that this form of words gave them the right to have all their troops and property transported by these companies free of charge; and that as full performance was, in the condition of things at that time, impossible, they waived the exercise of that right as long as the war lasted, and would make a provisional arrangement for that time to enable the companies to get along.

Were not the parties who received and acted upon grants made the next year bound to know and understand the sense in which Congress used this form of words? Can they now be heard to say that another and far different meaning was attached to them by Congress from that which the same body asserted for them a year before? If they did not wish to accept the grants under that construction, they need not do it. But if they did accept them, and have sold the land, they are bound by the public statutory construction previously given by Congress of the meaning which they attached to the words used in the grants. For these reasons, I am of opinion that the judgment of the Court of Claims ought to be affirmed.

RUSSELL v. DODGE.

1. Where a reissued patent is granted upon a surrender of the original, for its alleged defective or insufficient specification, such specification cannot be substantially changed in the reissued patent, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention, as originally claimed. A defective specification can be rendered more definite and certain, so as to embrace the claim made, or the claim can be so modified as to correspond with the specification; but, except under special circumstances, this is the extent to which the operation of the original patent can be changed by the reissue.
2. Where the patent was for a process of treating bark-tanned lamb or sheep skin by means of a compound, in which heated fat liquor was an essential ingredient, and a change was made in the original specification, by eliminating the necessity of using the fat liquor in a heated condition, and making, in the new specification, its use in that condition a mere matter of convenience, and by inserting an independent claim for the use of fat liquor in the treatment of leather generally, the character and scope of the invention, as originally claimed, were held to be so enlarged as to constitute a different invention.
3. The action of the Commissioner of Patents, in granting a reissue within the limits of his authority, is not open to collateral impeachment; but, his

authority being limited to a reissue for the same invention, the two patents may be compared to determine the identity of the invention. If the reissued patent, when thus compared, appears on its face to be for a different invention, it is void, the commissioner having exceeded his authority in issuing it.

4. *Klein* v. *Russell*, 19 Wall. 433, stated and qualified.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

Mr. Horace E. Smith for the appellant.

Mr. T. L. Wakefield, *contra*.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit for an infringement of a patent, obtained by the complainant for an alleged new and useful improvement in the preparation of leather, with a prayer that the defendant be decreed to account for and pay to him the gains and profits derived by them from making, using, and vending the improvement, and be enjoined from further infringement. The court below dismissed the bill, and the complainant appealed to this court.

The patent bears date in February, 1870, and was issued upon a surrender and cancellation of a previous patent obtained by the complainant in August, 1869, upon the allegation that the original patent was inoperative and invalid by reason of an insufficient and defective specification of the improvement. The validity of the reissued patent is assailed on the ground that it describes a different invention from that claimed in the original patent, and for want of novelty in the invention. Other grounds of invalidity are also stated; but, in the view we take of the case, they will not require consideration.

In the schedule accompanying the patent, giving a description of the alleged invention, and constituting a part of the instrument, the complainant declares that he has "invented a new and useful improvement in the preparation of leather;" that "the invention consists in a novel preparation of what is known as bark-tanned lamb or sheep skin," by which the article is rendered soft and free, and adapted, among other uses, for the manufacture of what are termed "dog-skin gloves;" and that "the principal feature of the invention consists in the employment of what is known among tanners and others as

'fat liquor,' which is ordinarily obtained by scouring deer-skin after tanning in oil," but which may be produced by the cutting of oil with a suitable alkali. The schedule then proceeds to state that in treating the leather with fat liquor "it is desirable to heat the liquor to or near the boiling-point, and that it is preferred to use the same in connection with other ingredients," such as soda, common salt, and soap, in specified quantities for each ten gallons of the heated liquor; and that "to effect the treatment" the skin should be well dipped in or saturated with the fat liquor or compound, of which fat liquor is the base. The schedule closes by a declaration that what the patentee claimed and desired to be secured by letters-patent was, —

1. "The employment of fat liquor in the treatment of leather substantially as specified."

2. "The process, substantially as herein described, of treating bark-tanned lamb or sheep skin by means of a compound composed and applied essentially as specified."

It is clear from this statement that the patent is for the use of fat liquor in any condition, hot or cold, in the treatment of leather, and for a process of treating bark-tanned lamb or sheep skin, by means of a compound in which fat liquor is the principal ingredient. The state of the liquor is not mentioned as essential to the treatment, or to accomplish any of the results sought. It is only stated as a thing to be desired, that the liquor should be heated, and that it would be preferable that other ingredients were mixed with the heated liquor to make the compound mentioned. In other words, the specification declares, that by heating the liquor the effect desired will be more readily produced; that is, more speedily or with less trouble and expense, not that the heating is in any respect essential to the treatment. Where a useful result is produced in any art, manufacture, or composition of matter by the use of certain means for which the inventor or discoverer obtains a patent, it is, as justly observed by the presiding justice of the Circuit Court, too plain for argument, that the means described must be the essential and absolutely necessary means, and not mere adjuncts which may be used or abandoned at pleasure.

The original patent was less extensive in its claim than the reissue. That patent was for a process of treating bark-tanned lamb or sheep skin by means of a compound, in which heated fat liquor was an essential ingredient. The specification was explicit in this particular, and left no doubt on the subject. The reissued patent covers the use of the fat liquor in any condition, hot or cold, and when used alone or in a compound with other ingredients, and thus has a more extended operation, bringing under it manufactures not originally contemplated by the patentee. Is such a reissue valid?

The statute of 1836 (2 Stat. 122), under which the reissue was granted, provided that whenever any patent was inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming as his own invention more than he had a right to claim as new, if the error arose from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, it should be lawful for the commissioner, upon the surrender of such patent and the payment of a prescribed duty, to cause a new patent to be issued to the inventor for the same invention, for the residue of the period then unexpired, in accordance with the corrected description and specification.

According to these provisions, a reissue could only be had where the original patent was inoperative, or invalid, by reason of a defective or insufficient description or specification, or where the claim of the patentee exceeded his right; and then only in case the error committed had arisen from the causes stated. And as a reissue could only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. A defective specification could be rendered more definite and certain so as to embrace the claim made, or the claim could be so modified as to correspond with the specification; but except under special circumstances, such as occurred in the case of *Lockwood* v. *Morey*, 8 Wall. 230, where the inventor was induced to limit his claim by the mistake of the Commissioner of Patents, this was the extent to which the operation of the

original patent could be changed by the reissue. The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the reissue.

Judged by that law, — and the provisions of the act of 1870 on this subject are substantially the same, — there can be no doubt of the invalidity of the reissue. The original patent was not inoperative nor invalid from any defective or insufficient specification. The description given of the process claimed was, as stated by the patentee, full, clear, and exact, and the claim covered the specification; the one corresponded with the other. The change made in the old specification, by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and the insertion of an independent claim for the use of fat liquor in the treatment of leather generally, operated to enlarge the character and scope of the invention. The evident object of the patentee in seeking a reissue was not to correct any defects in specification or claim, but to change both, and thus obtain, in fact, a patent for a different invention. This result the law, as we have seen, does not permit.

The decision of the commissioner in granting the reissue is, it is true, so far conclusive as to preclude in the present suit for infringement any inquiry into its correctness outside of the patents themselves. His action in any case, within the limits of his authority, is not open to collateral impeachment. But that authority being limited to a reissue for the same invention as that embraced in the original patent, a reissue for any thing more is necessarily inoperative and void. To determine the identity of the invention, the two patents may be compared. Thus compared, the reissue here appears on its face to be for a different invention, and the commissioner, therefore, exceeded his authority in issuing it. *Seymour* v. *Osborn*, 11 Wall. 544; *Wicks* v. *Stevens*, 2 Woods, 312.

In the case of *Klein* v. *Russell*, 19 Wall. 433, the question was not before the court whether the reissued patent was invalid because not for the same invention. The point was not made in that case in the court below, and for that reason, it was stated, the point could not be made here. It was to

be presumed, said this court, until the contrary was made to appear, that the commissioner did his duty correctly in granting the reissue. What was subsequently said of the character of the first claim, so far as it conflicts with the construction here given, does not meet our approval, after the extended consideration the subject has since received.

But, assuming that the reissue is not void for the reasons stated, the patent is still invalid for want of novelty in the alleged invention. The use of fat liquor in the treatment of bark-tanned skins was general with manufacturers for many years previous to the alleged invention. Testimony to this effect is given by numerous witnesses. It would subserve no useful purpose to state this testimony; it is set forth with ample fulness in the opinion of the Circuit Court. It is sufficient for us to say, that it is entirely satisfactory to our minds.

Decree affirmed.

WIGGINS v. PEOPLE, ETC., IN UTAH.

1. A writ of error from this court to the Supreme Court of the Territory of Utah is allowed by sect. 8 of the act of Congress of June 23, 1874 (18 Stat. 254), in criminal cases, where the accused has been sentenced to capital punishment, or convicted of bigamy or polygamy.
2. In a trial for homicide, where the question, whether the prisoner or the deceased commenced the encounter which resulted in death, is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner.

ERROR to the Supreme Court of the Territory of Utah.

Argued by *Mr. George H. Williams* for the plaintiff in error, and by *Mr. Solicitor-General Phillips, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

Sect. 3 of the act of Congress of June 23, 1874 (18 Stat. 254), allows a writ of error from this court to the Supreme Court of the Territory of Utah, where the defendant has been convicted of bigamy or polygamy, or has been sentenced to death for any crime. The present writ is brought under that statute to obtain a review of a sentence of death against plaintiff in error for the

murder of John Kramer, commonly called Dutch John, in Salt Lake City. The only error insisted upon by counsel, who argued this case orally, was the rejection of testimony offered by the prisoner, as shown by the following extract from the bill of exceptions: —

"The defendant, on the trial of this cause, called Robert Heslop as a witness in his defence, who testified: —

"That, just a short time before the shooting, the deceased showed him a pistol which he (deceased) then had upon his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggels's store.

"The prosecuting attorney admitted that this was after the deceased was ejected from defendant's saloon.

"Whereupon the counsel for the defendant asked witness the following questions: —

"What, if any, threats did the deceased make against the defendant at this time? which was objected to by the prosecuting attorney, for the reason it was immaterial.

"The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.

"Defendant's counsel then asked witness, what, if any thing, did deceased then say concerning the defendant.

"(Objected to by prosecuting attorney as incompetent.)

"Defendant's counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, the deceased, in the hearing of said witness, made the threat that he would kill the defendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.

"Which was objected to by the counsel for the prosecution, because it was incompetent.

"The objection was sustained by the court, to which the defendant then and there excepted.

"This witness, and several others, testified that the deceased's general character was bad, and that he was a dangerous, violent, vindictive, and brutal man."

Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him,

there is a modification of the doctrine in more recent times, established by the decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, § 1027: "Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendant's life." *Stokes* v. *People of New York*, 53 N. Y. 174; *Keener* v. *State*, 18 Ga. 194; *Campbell* v. *People*, 16 Ill. 18; *Holler* v. *State*, 37 Ind. 57; *People* v. *Arnold*, 15 Cal. 476; *People* v. *Scroggins*, 37 id. 676.

Counsel for the government, conceding this principle to be sound, sustains the ruling of the court below, on the ground that there is no evidenee in the case to show any hostile movement or attitude of the deceased towards the prisoner at the time of the fatal shot, and that there is conclusive evidence to the contrary. In support of this latter position, he relies on the testimony of Thomas Dobson, the only witness of the meeting which resulted in the death of deceased by a pistol-shot from defendant.

Before criticising Dobson's testimony, it is necessary to state some preliminary matters.

It appears that, on the night of the homicide, the deceased and a man of similar character, called Bill Dean, got into a quarrel, in a drinking-saloon kept by defendant, in which they both drew pistols. Defendant interposed, and took their pistols from them, and turned them out of his saloon by different doors. He gave Dean his pistol as he turned him out, and asserts that he also returned the deceased *his* pistol; but of this there is doubt. Shortly after this, he started homewards, and fell in company with Dobson, who was a night watchman of Salt Lake City. As they went along the street, Dean was discovered in the recess of a doorway on the sidewalk with a pistol in his hands, and defendant went up to him, took it away from him, and he ran down the street. Passing on, Dobson and defendant came in front of a hotel, the Salt Lake House,

where the homicide occurred, of which Dobson, the only witness, tells his story thus: —

"As I came down street, about two o'clock in the morning, I saw Dutch John sitting on the carriage-steps of the Salt Lake House, with his face resting on his hands, apparently in a stupor or asleep. Wiggins, the defendant, was with me. He (Wiggins) jumped to my rear, and immediately the firing commenced. I do not know, and cannot tell, who fired the first shot. At the first report, I turned round and saw the blaze of the second shot from a pistol in the hands of Wiggins. I had advanced to the carriage-steps, and said, 'Jack, don't kill him.' Wiggins then jumped on carriage-steps and fired another shot, which passed right by in front of me and into the body of Dutch John. Dutch John grabbed me around the legs, and we fell over the steps into the street. When I turned and saw the first shot from Wiggins's pistol, I saw Dutch John's hands raised, and heard him cry out, 'Don't kill me; I am not armed.' Immediately after the firing ceased, Wiggins stooped down as if to pick up something, and when he raised up he had something in his left hand; but I cannot tell whether it was a pistol or not. At the same time, Wiggins made the remark to the deceased, 'You wanted to kill me,' or 'You tried to kill me.' I am not sure which expression was used."

If we are to believe implicitly all that is here said by this witness, we do not see in it conclusive evidence that defendant fired the first shot, and that no previous demonstration was made by deceased. On the contrary, he says he does not know, and cannot tell, who fired the first shot. He does say, that, when the vision of Dutch John met their eyes, the defendant "jumped behind witness, and *immediately*" (that is, just after) "the firing commenced." He also says, that, immediately after the firing ceased, defendant stooped down as if to pick up something, and arose with something in his hand.

We do not think that this statement proves at all, certainly not conclusively, that deceased did *not* fire the first shot. Either there must have been some reason for defendant's jumping behind witness, and he must have picked up a pistol which fell from the hands of deceased, or he was guilty of consummate acting, for the purpose of deceiving witness, and making evidence to defend himself from the charge of a murder which he intended to commit.

It is difficult to believe that, on a sudden encounter, any one would have such cool deliberation; and it is much more reasonable to believe that the seeking of safety, by jumping behind the witness, was caused by some movement or other evidence of hostile intent by deceased which escaped the less vigilant eye of witness, and that it was the display of the pistol which the defendant afterwards picked up. This latter view is supported by other testimony, to be presently noticed.

But it is pertinent here to remark, that both the effect of this witness's testimony and his credibility were to be weighed by the jury, and that doubt was thrown on the latter by showing, that, in the preliminary examination, he had made statements at variance with what he now stated, which were more favorable to defendant.

Take all these together, and we think the court had no right to assume that it was beyond doubt that defendant had commenced the assault, which resulted in death, by firing the first shot, without any cause, real or apparent. In this we are confirmed by other parts of the testimony displayed in the bill of exceptions.

It is nowhere asserted that defendant fired more than three shots. A witness, however, who was within hearing, swears positively that he heard four shots. In agreement with this, it is proved, without contradiction, that when defendant was arrested, immediately after the shooting, three pistols were found on him. Of one of these, three barrels were empty; of another, one; and the third was fully loaded. The police-officer who arrested defendant says of these pistols, "The one identified as Dutch John's had one chamber empty; the one identified as Bean's had three chambers empty; and the derringer was loaded." It is a fair inference that the three empty barrels were those he had discharged at deceased, and that the other was the one he had picked up after the shooting, which had been in the hands of deceased.

Whence comes the fourth shot, and who emptied the chamber of deceased's pistol? That deceased had a pistol with him is a concession made by the prosecuting attorney on the trial. It will be seen, in the extract from the bill of exceptions first given, that the witness, Heslop, testifies positively, that, just a

short time before the shooting, the deceased showed him a pistol, which he then had on his person, while sitting on a box on the side of the street opposite the scene of the homicide; and the prosecution admitted that this was after the deceased had been ejected from the saloon.

Here, then, was a man who had, a few hours or minutes before, had a difficulty, in which pistols were drawn; who was known to be of desperate and vindictive character; who had shown a witness a pistol within a few minutes preceding the fatal encounter, and that pistol was, after the encounter, picked up on the sidewalk, where it occurred, with a chamber empty. Also, strong evidence to show that one more shot was fired than defendant had fired, and the probability that it came from the pistol of deceased at that time.

Now, when, under all these circumstances, the witness, and the only witness who was present at the encounter, swears that he cannot tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent, that if the person, to whom the deceased exhibited that pistol a few minutes before the shooting, had been permitted to tell the jury that deceased then said, "he would kill defendant before he went to bed that night," it would have tended strongly to show where that first shot came from, and how that pistol, with one chamber emptied, came to be found on the ground. This testimony might, in the state of mind produced on the jury by the other evidence we have considered, have turned the scale in favor of defendant. At all events, we are of opinion that in that condition of things it was relevant to the issue, and should have been admitted.

Judgment reversed, with directions to set aside the verdict, and grant a new trial.

MR. JUSTICE CLIFFORD dissenting.

Murder is the charge preferred against the prisoner, which, at common law, is defined to be, when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and in the peace of the State, with malice aforethought, either express or implied. Modern statutes defining murder in many cases affix degrees to the offence, according to the nature

and aggravation of the circumstances under which the act of homicide is committed.

Offences against the lives and persons of individuals are defined by the statutes of Utah, as follows: Whoever kills any human being, with malice aforethought, the statute of the Territory enacts, is guilty of murder; and the succeeding section of the same act provides that all murder perpetrated by poison or by lying in wait, or by any other kind of wilful, deliberate, and premeditate killing, or which is committed in the perpetration, or attempt to perpetrate, any one of the offences therein enumerated, is murder of the first degree, and shall be punished with death. Laws Utah, 51, c. 21, tit. 2, sects. 4, 5.

Pursuant to that enactment, the grand jury of the third judicial district, in due form of law, preferred an indictment against the prisoner for the murder of John Kramer, charging that he, the prisoner, did, at the time and in the manner and by the means therein described, feloniously, wilfully, deliberately, premeditatedly, and with malice aforethought, kill and murder the deceased, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the United States resident in the said Territory.

Sufficient appears to show that the prisoner was arraigned in due form of law, and that he pleaded to the indictment that he was not guilty, as required by the statute of the Territory; that, material witnesses for the prisoner being absent, the indictment was on his motion continued to the next term of the court. Both parties being ready at the succeeding term of the court, the jury was duly impanelled, and sworn well and truly to try the issue, as provided by law. Witnesses were called and examined by the prosecution and for the defence, and the cause was regularly committed to the jury having the prisoner in charge.

None of these proceedings are called in question; and it appears that the jury retired, and, having duly considered the case, returned into court, and gave their verdict that the prisoner is guilty of murder in the first degree. Sentence in due form of law was rendered by the court, as more fully appears in the record; and the prisoner excepted to the rulings and instructions of the court, and appealed to the Supreme Court of the Territory,

as he had by law a right to do, where the judgment of the subordinate court was affirmed. Laws Utah, 66, c. 31, sect. 5.

Error lies from that court to the Supreme Court in criminal cases, where the accused has been sentenced to capital punishment; and the record shows that the prisoner sued out a writ of error, and removed the cause into this court. 18 Stat. 254.

Four errors are assigned in the transcript: 1. That the court erred in affirming the judgment of the District Court. 2. That the court erred in holding that the affidavit offered to procure a continuance was insufficient. 3. That the court erred in sustaining the ruling of the District Court, that the uncommunicated threats of the deceased, made in connection with the exhibition of a pistol a short time before the homicide, were inadmissible in evidence to the jury. 4. That the court erred in overruling the exceptions of the prisoner to the instructions given to the jury by the District Court.

Two of the errors assigned — to wit, the second and fourth — having been abandoned here in the argument for the prisoner, the re-examination of the case will be confined to the third assigned error, as the only remaining one which deserves any special consideration.

Expert testimony, not in any way contradicted, was introduced by the prosecutor to the effect that the witness saw the deceased immediately after he came to his death, and he testified that he made a *post-mortem* examination of the body the next day; that the deceased received two pistol wounds; that one shot struck him in the side, a little back of a middle line from the hollow of the arm down and just at the border of the ribs; and the witness stated that he examined that wound, but that he did not trace the ball, as the other wound was the one that proved fatal; that the other shot struck him in the chin, and that, ranging downward, it cut the external jugular vein, the ball burying itself in the muscles of the shoulder, and that the deceased bled to death from that wound; and the witness added, to the effect that from the course the ball took, and the wounds it made in its course, the deceased must have been sitting at the time with his head bowed down and resting on his breast.

Death ensued immediately; and the record discloses what

immediately preceded the homicide and what occurred at the time it was committed. Beyond doubt, the homicide occurred about two o'clock in the morning; and it is equally certain that it was effected by the described shots from a pistol. Prior to that time,— say about one o'clock or a little later, — the deceased, with six or seven other persons, was in the saloon of the prisoner, and it appears that the deceased and two of the others had a difficulty, and that one of them was struck over the head in the affray. Revolvers were drawn by the deceased and one Bean, when the prisoner interfered and took the pistols from both of them, and in the scuffle struck the deceased over the head. He then put Bean out of the back-door, gave him his pistol, and told him to go home; and he put the deceased out of the front-door, and told him to go home. Half an hour or more later the prisoner came down the street with one of the witnesses for the prosecution, and when they arrived in front of the Salt Lake House the witness states that he saw the deceased sitting on the carriage-steps of the hotel, with his face resting on his hands, apparently in a stupor or asleep; that the prisoner jumped to the rear of the witness, and that the firing immediately commenced; that the witness did not know, and cannot tell, who fired the first shot; that at the first report he, the witness, turned round and saw the blaze of the second shot from a pistol in the hands of the prisoner. Witness advanced to the carriage-steps, and he testifies that he said to the prisoner, "Jack, don't kill him," to which it seems no response was given. Instead of that, the prisoner then jumped to the carriage-steps and fired another shot, which, as the witness states, passed right in front of him into the body of the deceased. Something may be inferred as to its effect, from the fact that the deceased raised his hands, as the witness states, and that he heard him say, "Don't kill me, I am not armed." Immediately after the firing ceased the prisoner stooped down as if to pick up something, and when he rose up the witness noticed that he had something in his left hand, but the witness is not able to state what it was.

Three witnessess testify that there were three shots fired in rapid succession in front of the hotel, and one of them states that he heard a fourth shot farther down the street. Two of

the witnesses concur that the first shot ranged from east to west, and that the range of the other two bore a little to the north of west.

Several witnesses were examined for the defence, and one of them testified that the deceased, when he was put out of the saloon and told to go home, said he would go if the prisoner would give his gun, and that the prisoner pushed him out of the door and handed him his pistol, and that the deceased remarked, "I will make it hot for you." Testimony was also given by another witness called for the defence, to the effect that the deceased, after he was ejected from the saloon, showed the witness a pistol when he was sitting in front of a store opposite the Salt Lake House.

Two questions were asked the witness, as follows: 1. What, if any, threats did the deceased make against the prisoner? 2. What, if any thing, did the deceased say concerning the prisoner?

Objection was made to each question, and both were excluded by the court, and the prisoner excepted to the respective rulings. Had the questions been admitted, the prisoner expected to prove that the deceased made the threat that he would kill the prisoner before he went to bed that night; but the defence admitted that the evidence would not show that the prisoner had knowledge of the threat at the time of the killing. Due exception was taken to the ruling, which is the basis of the assignment of error not waived by the prisoner. Evidence was also introduced by the defence that the general character of the deceased was bad, and that he was a dangerous, violent, and brutal man.

Subsequent to the affray in the saloon, and before the homicide, the deceased had a conversation with another witness called and examined by the prosecution. He said that the prisoner had taken his pistol from him and beat him over the head with it, and it appears that he showed the witness the wounds in his head. About an hour or less after that interview they met again, in front of the hotel, and walked up the street together, and in the course of the conversation the witness asked him if he was armed, and the deceased gave the witness very positive assurance that he was not, that he had no

weapon about him except a pocket-knife, which he showed to the witness. Presently the deceased left and went down the street, and the witness, in about a minute, started in the same direction, and as he passed the saloon where the affray occurred the prisoner came out and commenced conversing with the witness. Among other things, he said that the deceased and Bean had a difficulty in his saloon, and that he took their pistols away from them and beat them over the head with the pistols; that he put one of them out of the back-door and the other out of the front-door; that he gave Bean back his pistol, and told him that they could not have any trouble in the saloon; that if there was to be any killing there, he was going to do it himself. At that stage of the conversation the witness asked him what he did with the pistol of the deceased, and the witness states that the prisoner pulled back the lapel of his coat, and said, "I have it here." Immaterial matters are omitted. Suffice it to say, the prisoner proceeded down the street, and the witness soon followed; and when the latter got around Godbe's corner he heard a shot fired, then he turned and ran back towards the hotel, and when he turned the corner he saw the flash and heard the report of two other shots, and when he got in front of Hale's saloon he heard another shot farther down the street.

Four shots were heard; and the witness, who was a police-officer, states that when he came in front of the hotel he was requested to arrest the prisoner, and that he ran towards the corner where the prisoner was crossing and called to him to stop, and that he came back, and that they started up the street, when the following conversation ensued: "I said, 'Jack, I guess you have killed Dutch John.' He said, 'If I haven't, I will.' When they got in front of the hotel, I asked him for his pistol. He handed me one, saying, 'That is Bill Bean's;' and another, 'That is Dutch John's;' and a third one, a single-barrelled derringer, and said, 'This is mine.'" One chamber was empty in the pistol identified as Dutch John's, and three chambers were empty in the one identified as Bean's, and the derringer was loaded.

Questions of the kind involved in the single assignment of error to be re-examined cannot be understandingly determined without a clear view of what the state of the case was at the

time the ruling was made, and inasmuch as it is the judgment of the Supreme Court of the Territory to which the writ of error is addressed, it seems to be just and right that the reasons which that court assigned for affirming the judgment of the subordinate court should receive due consideration.

Enough appears to show that the prisoner insisted that the evidence of uncommunicated threats should have been admitted, because there is a conflict in the testimony as to who fired the first shot, and that the evidence of the threats, if it had been admitted, would have aided the jury in determining that question. Influenced by that suggestion, the first step of the court, apparently, was to examine the evidence reported in the transcript; and, having come to the conclusion that there is no conflict in the evidence as to who fired the first shot, they decided that the ruling of the District Court excepted to, in excluding the two questions as to the threats, is correct.

Introductory to that conclusion, they find the facts to be, that the deceased was sitting upon a carriage-step in front of the hotel, with his hands up to his face and his head bowed down, apparently in a stupor or asleep, as the prisoner and the night-watch came near, and that the prisoner, as they were passing, jumped behind the witness, and that the firing immediately commenced, the testimony of two witnesses being that the firing was from east to west, and that the prisoner was east of the deceased. Obviously, they regarded the statement of the witness, that he did not know who fired the first shot, as merely negative testimony; for they proceed to state that the positive testimony of the two witnesses, that the firing was from east to west, showed that it was impossible that the deceased should have fired the first shot.

In the next place, they advert to the statement that the prisoner stooped down, just after the shooting, as if to pick up something, and to the testimony of one of his witnesses, that he exhibited a pistol shortly before his death; and they remark, that the testimony, if no other facts were found, might tend to prove that the deceased had a pistol in his possession, but that it would not be sufficient to raise a doubt as to who fired the first shot.

Even conceding the truth of the testimony, they still were of

the opinion that the prisoner was the aggressor; but they proceeded to say that they did not think that the deceased even had a pistol, and gave their reasons for the conclusion, as follows: "His pistol was in the hands of the prisoner just before and just after the killing, and if the deceased had a pistol, as one witness testifies, shortly before his death, it is evident that he did not have it when he was killed, for after the first shot he threw up his arms and said, 'Do not kill me, I am unarmed,' a thing which it is not reasonable to suppose he would have said if he had just fired the first shot, and, besides, no such pistol was found on his person or near him after the killing." "If the prisoner had picked up an additional pistol, it would certainly have been found upon him; but such was not the fact;" and they add, that "this second pistol, if any existed, could not have been in the possession of the deceased when he was killed."

Suppose the facts to be as found by the Supreme Court of the Territory, then it follows that there was no evidence in the case tending to show that the deceased was the aggressor, or that the act of homicide was perpetrated in self-defence, within the principles of the criminal law as understood and administered in any jurisdiction where our language is spoken.

Homicide, apparently unnecessary or wilful, is presumed to be malicious, and, of course, amounts to murder, unless the contrary appears from circumstances of alleviation, excuse, or justification; and it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise from the evidence produced against him by the prosecution. Fost. Cr. L. 255; 1 East, P. C. 224; 4 Bl. Com. 201; 1 Russ., C. & M. (4th ed.) 483.

Cases arise, as all agree, where a person assailed may, without retreating, oppose force to force, even to the death of the assailant; and other cases arise in which the accused cannot avail himself of the plea of self-defence, without showing that he retreated as far as he could with safety, and then killed the assailant only for the preservation of his own life. Fost. Cr. L. 275; 1 East, P. C. 277; 4 Bl. Com. 184.

Courts and text-writers have not always stated the rules of decision applicable in defences of the kind in the same forms of

expression. None more favorable to the accused have been promulgated anywhere than those which were adopted seventy years ago, in the trial of Selfridge for manslaughter. Pamph. Rep. 160.

Three propositions were laid down in that case: 1. That a man who, in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. 2. That when the attack upon him is so sudden, fierce, and violent, that a retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all. 3. That when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Learned jurists excepted at the time to the third proposition, as too favorable to the accused; but it is safe to affirm that the legal profession have come to the conclusion that it is sound law, in a case where it is applicable. Support to that proposition is found in numerous cases of high authority, to a few of which reference will be made.

When one without fault is attacked by another, under such circumstances as to furnish reasonable ground for apprehending a design to take away his life or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, the assailed may safely act upon the appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justified, although it may afterwards turn out that the appearances were false, and that there was not in fact either design to do him serious injury, or danger that it would be done. *Shorter* v. *People*, 2 Comst. 197; *People* v. *McLeod*, 1 Hill, 420; 1 Hawk. P. C., ch. 9, sect. 1, p. 79.

Two other cases decided in the same State have adopted the same rule of decision, and it appears to be well founded in rea-

son and justice. *Patterson* v. *People*, 46 Barb. 635; *People* v. *Sullivan*, 8 Seld. 400; *State* v. *Sloan*, 47 Mo. 612; Whart. on Homicide, 212; *State* v. *Baker*, 1 Jones (N. C.), 272; *Com.* v. *Drum*, 58 Penn. St. 9.

Unless the party has reasonable ground of apprehension at the time, the justification will fail; it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time. 1 East, P. C. 272; Ros. Crim. Ev. (7th Am. ed.) 768; *State* v. *Scott*, 4 Ired. 409; *State* v. *Harris*, 4 Jones, 190; *Dill* v. *State*, 25 Ala. 15; *Dyson* v. *State*, 26 Miss. 362; *Holmes* v. *State*, 23 Ala. 24; *Carroll* v. *State*, 23 id. 33.

Two grounds are assumed in support of the proposition that the evidence of previous threats ought to have been admitted: 1. That it would have confirmed the other evidence introduced by the prisoner to prove that he committed the act of homicide in self-defence. 2. That it would have aided the jury in determining which of the parties fired the first shot.

Remarks already made are sufficient to show that a bare fear of danger to life, unaccompanied by any overt act or manifestation indicative of a felonious intent to that effect, will not justify the person entertaining such fears in killing the supposed assailant. Such a defence is not made out, unless all the conditions of the proposition before explained concur in the immediate circumstances which attend the act of homicide.

When a person apprehends that another, manifesting by his attitude a hostile intention, is about to take his life, or to do him enormous bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may, if no other practicable means of escape are at hand, oppose force by force, and may even kill the assailant, if that be necessary to avoid the apprehended danger; but he must act and decide as to the necessity and the force of the circumstances at his peril, and with the understanding that his conduct is subject to judicial investigation and review.

Apply that rule to the case before the court, and it is clear that there was no evidence in the case tending to show that

the prisoner killed the deceased in self-defence. Proof to that effect is entirely wanting, and every attending circumstance disproves the theory, and shows that such a defence, if it was set up in the court below, was utterly destitute of every pretence of foundation, as appears from the following circumstances: 1. That the prisoner was not alone. 2. That when he, in company with the night-watchman, approached the hotel, the deceased was sitting on the steps, asleep or in a stupor, apparently unaware of their approach. 3. That the prisoner might have passed on, turned back, or stood still in perfect safety. 4. That if he feared any thing, his needful protection was at hand. 5. That the deceased neither spoke nor moved, and was as harmless as if he had been inanimate matter. 6. That the prisoner, better than any one else except the sleeping man, knew that the deceased was unarmed, because he, the prisoner, had the pistol of the deceased in his own pocket. 1 Gabb. Cr. L. 496.

Viewed in the light of the attending circumstances, it is amazing that any one can come to the conclusion that there is any evidence tending to show that the prisoner, as a reasonable being, could have believed that it was necessary to take the life of the deceased in order to save his own life, or to save himself from enormous bodily harm. *Logue* v. *Com.*, 38 Penn. St. 265.

Stronger evidence of express malice is seldom or never exhibited, as appears from the fact that he continued to fire after the wounded man threw up his hands and cried out, "Don't kill me, I am unarmed," and also from the fact that when the police-officer remarked to him, "Jack, I guess you have killed Dutch John," he said, "If I haven't, I will."

Testimony merely confirmatory of a proposition, wholly unsupported by other evidence, is not admissible as substantive evidence. Grant that, and still it is insisted by the prisoner that the evidence of previous threats made by the deceased should have been admitted to confirm the evidence introduced by the prisoner, to prove that the deceased fired the first shot.

Mere theories are not entitled to consideration, unless they find some support in the evidence. There is no evidence in the case tending to show that the deceased fired the first shot,

or that he fired at all, or that he manifested any intention to offer any violence whatever to the prisoner. Two witnesses testify that the prisoner, when he jumped behind the night-watchman, was east of the deceased, and that the range of the firing was from east to the west, fully justifying the conclusion of the court below that it is impossible that the deceased should have fired the first shot.

Better reasons for the admissibility of the evidence must be given than those suggested in the preceding propositions, else the assignment of errors cannot be sustained, as it is clear that the other evidence in the case discloses no real theory of defence which the excluded testimony would tend to confirm.

Some stress is laid upon the fact that one witness testified that the deceased showed him a pistol after he was ejected from the saloon; but the answer to that, given by the court below, is quite satisfactory, which is, that the pistol of the deceased was in the possession of the prisoner just before and immediately after the killing, and that if the deceased had a pistol, as the witness testified, it is evident he did not have it when he was killed, for after the first shot he threw up his hands, and said, "Don't kill me, I am unarmed." Declarations of the kind made in *articulo mortis* are competent evidence; and, there being nothing in the case to contradict the statement, it is entitled to credit. 1 Greenl. Ev., sect. 156; Ros. Crim. Ev. (7th ed.) 30.

Four shots were fired; and when the prisoner was arrested, immediately after the homicide, he gave up three pistols to the officer, — his own, the deceased's, and Bean's. There was one empty chamber in the deceased's pistol, and three empty chambers in Bean's, showing that the prisoner had been in no danger throughout, except from the multiplicity of fire-arms which he had in his own pockets.

Attempt is next made in argument to show that evidence of previous threats made by the deceased is admissible in behalf of the prisoner, even though he did not introduce any other evidence which it tends to confirm, the suggestion being that the modern decisions support that proposition.

Criminal homicide, in order that it may amount to murder, must have been perpetrated with malice aforethought; and the

prosecution, to prove the ingredient of malice, may introduce evidence of lying in wait, antecedent menaces, former grudges, or any formed design or concerted scheme to do the deceased bodily harm. Malice is the essential criterion by which murder is distinguished from manslaughter, and of course it must be charged in the indictment and proved at the trial. Acts, conduct, and declarations of the kind, if done or made by the prisoner, are clearly admissible when offered by the prosecution; but the case is generally different when the evidence is offered in respect to the deceased.

Years ago evidence was offered, in a case of manslaughter, to show that the deceased was well known by the defendant and others as a drunken, quarrelsome man; but the court excluded the testimony, holding to the effect that the evidence was immaterial, as it constituted no defence to the accused. *State* v. *Field*, 14 Me. 244.

Later, the defendant in another jurisdiction offered evidence to prove that the deceased was a man of great muscular strength, practised in seizing persons by the throat in a peculiar way, which would render them helpless and shortly deprive them of life; but the court excluded the evidence, holding that the only evidence which was relevant and material was the manner in which the deceased assaulted the defendant at the time of the homicide. *Com.* v. *Mead*, 12 Gray, 169.

Decided cases, too numerous for citation, are reported, in which it is held that evidence of the bad character of the deceased is not admissible in an indictment for felonious homicide, for the reason that it cannot have any effect to excuse or palliate the offence. Reported cases of an exceptional character may be found where it is held that evidence of the dangerous character of the deceased may be admitted to confirm other evidence offered by the prisoner, to show that the killing was in self-defence. 2 Bishop, Crim. Proced. (2d ed.) sect. 627.

Difficult questions also arise in other cases, as to the admissibility of previous threats made by the deceased. Judges and text-writers generally agree that such threats, not communicated to the prisoner, are not admissible evidence for the defence, where the charge is felonious homicide.

Courts of justice everywhere agree that neither the bad

character of the deceased nor any threats that he may have made forfeits his right to life, until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person. *Prichett* v. *State*, 22 Ala. 39; *Com.* v. *Hilliard*, 2 Gray, 294.

Exceptional cases arise where it is held that the evidence should be received as confirmatory of other evidence in the case tending to support the theory that the killing was in self-defence. Cases of that character may be found where courts have ruled that evidence of the kind may be admitted, even though the prisoner had no knowledge of the same at the time of the alleged felonious homicide; but there is not a well-considered case to be found anywhere, in which it is held that evidence of previous threats is admissible as substantive proof that the act of homicide was committed in self-defence, nor which shows that such evidence is admissible for any purpose, whether the threats were known or unknown to the prisoner, except to confirm or explain other evidence in the case, tending to justify or excuse the homicidal act, as having been committed in opposing force to force in defence of life, or to avoid enormous bodily harm. 2 Whart. Cr. L. (6th ed.) 1020; 1 Hale, P. C. 481.

Provided the uttering of the threats was known to the prisoner, the tendency of modern decisions is to admit the evidence, even if the other evidence to support the theory of self-defence is slight, and to exclude it in all cases where the threats have not been communicated, unless the circumstances tend strongly to inculpate the deceased as the first aggressor. *People* v. *Lamb*, 2 Keyes, 466; *Powell* v. *State*, 19 Ala. 577; *Dupree* v. *State*, 33 id. 380.

Examples, almost without number, are found in the reported cases, which support those propositions, to a few of which reference will be made.

Violent threats were made by the deceased against the prisoner in the case of *Stokes* v. *People*, 53 N. Y. 174; and the court held that proof of the same was admissible, whether

known to the prisoner or not, inasmuch as other evidence had been given making it a question for the jury whether the homicidal act was or was not perpetrated by the prisoner in defending himself against an attempt of the deceased to take his life or to commit a felony upon his person.

Authorities to show that fear only is not sufficient to justify the taking of the life of another have already been referred to, of which there are many more. *State* v. *Collins*, 32 Iowa, 38; Whart. Homicide, 407.

Pursuant to that rule, it was held, in the case of *Newcomb* v. *State*, 37 Miss. 400, that the belief on the part of the accused that the deceased designed to kill him is no excuse for the homicidal act, unless the deceased at the time made some attempt to execute such a design, and thereby induced the accused reasonably to believe that he intended to do so immediately. Hence the court held that it was not competent for the accused to introduce evidence of an assault that the deceased committed on him six weeks before, nor to give evidence of previous uncommunicated threats, the other evidence showing that the deceased at the time of the killing made no hostile demonstration against the accused calculated to show that the accused was in any danger of life or limb.

Actual danger of the kind, or a reasonable belief of such actual danger, must exist at the time, else the justification will fail. Repeated threats, even of a desperate and lawless man, will not and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme.

Reasonable doubt upon that subject cannot be entertained; but the Supreme Court of Kentucky decided, that, where one's life had been repeatedly threatened by such an enemy, and it appeared that he had recently been exposed to an attempt by the same person to assassinate him, and that the previous threats were continued, the person threatened might still go about his lawful business, and if on such an occasion he happened to meet the threatener, having reason to believe him to be armed and ready to execute his murderous intention, and if he did so believe, and from the threats, the previous attempt at assassina-

tion, the character of the man, and the circumstances attending the meeting, he had a right to believe that the presence of his adversary put his life in imminent peril, and that he could secure his personal safety in no other way than to kill the supposed assailant, he was not obliged to wait until he was actually assailed. *Bohammon* v. *Com.*, 8 Bush, 488.

Beyond all doubt, that is the strongest case to support the theory set up for the prisoner in this case to be found in the judicial reports, and yet it is obvious that it does not make an approach to what is necessary to constitute a defence for the crime charged against the prisoner in the indictment.

Except where threats are recent, and were accompanied by acts and conduct indicative of an intention to execute the threatened purpose, the evidence of previous threats is not admitted by the Supreme Court of Arkansas. *Atkins* v. *State*, 16 Ark. 584; *Pitman* v. *State*, 22 id. 357.

Where the evidence of previous threats is necessary, in connection with the other evidence, to make out a case of self-defence, the Supreme Court of Indiana hold that the evidence is admissible. *Holler* v. *State*, 37 Ind. 61.

Jurists and text-writers appear to concur that antecedent threats *alone*, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests, at the time of the act, a design to carry the threats into immediate effect. *People* v. *Scroggins*, 37 Cal. 683.

Argument to establish that proposition seems to be unnecessary in this case, as the legislature of the Territory have enacted that a bare fear that a felony is about to be committed "shall not be sufficient to justify the killing" in such a case. "It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge," showing that the court below could not have decided otherwise than they did without violating the statute law of the Territory. Laws Utah, p. 60, sect. 112.

Weighed in the light of the adjudged cases, it is clear that the evidence of previous uncommunicated threats is never admitted in the trial of an indictment for murder, unless it

appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defence, and that the evidence of such threats may tend to confirm or explain the other evidence introduced to establish that defence.

Society, in my opinion, is deeply interested that criminal justice shall be accurately and firmly administered; and, being unable to concur in the opinion and judgment of the court in this case, I have deemed it proper to state the reasons for my dissent.

SMITH v. GOODYEAR DENTAL VULCANITE COMPANY ET AL.

1. Where the claim for a patent for an invention, which consists of a product or a manufacture made in a defined manner, refers in terms to the antecedent description in the specification of the process by which the product is obtained, such process is thereby made as much a part of the invention as are the materials of which the product is composed.
2. Whether the single fact that a device has gone into general use, and displaced other devices previously employed for analogous uses, establishes, in all cases, that the later device involves a patentable invention, it may always be considered as an element in the case, and, when the other facts leave the question in doubt, it is sufficient to turn the scale.
3. *Hotchkiss* v. *Greenwood*, 11 How. 248, decides that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of the product. It does not decide that the use of one material in lieu of another in the formation of a manufacture can, in no case, amount to invention, or be the subject of a patent.
4. In the present case, the result of the use, in the manner described in the specification, of hard rubber in lieu of the materials previously used for a plate for holding artificial teeth, or such teeth and gums, is a superior product, having capabilities and performing functions which differ from any thing preceding it, and which cannot be ascribed to mere mechanical skill, but are to be justly regarded as the results of inventive effort, as making the manufacture of which they are attributes a novel thing in kind, and, consequently, patentable as such.
5. A patent is *prima facie* evidence that the patentee was the first inventor, and casts upon him who denies it the burden of sustaining his denial by proof.
6. The presumption arising from the decision of the Commissioner of Patents, granting the reissue of letters-patent, that they are for the same invention which was described in the specification of the original patent, can only be overcome by clearly showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter.
7. Upon consideration of the history of this invention, the court holds: 1. That

there was no abandonment by the patentee of his original application. 2. That the application upon which the patent was finally allowed was a mere continuation of the original, and not a new and independent one. 3. That the invention was never abandoned to the public. 4. That reissued letters-patent No. 1904, dated March 21, 1865, for an alleged "improvement in artificial gums and palates," are valid.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity filed by the appellees against the appellant for an infringement of reissued letters-patent No. 1904, for "improvement in artificial gums and palates," granted March 21, 1865, to the appellees, as assignees of John A. Cummings. The bill prayed for an injunction, discovery, account, and assessment of damages.

The original letters-patent No. 43,009, for said improvement, were granted to said Cummings, and bear date June 7, 1864.

A decree was entered in favor of the complainants; whereupon the defendant appealed to this court, and assigns the following errors: —

First, The decree of the court below is erroneous, in adjudging that John A. Cummings was the original and first inventor of the improvement described and claimed in the reissued letters-patent No. 1904, dated March 21, 1865.

Second, In adjudging that the reissued letters-patent No. 1904, dated March 21, 1865, is a good and valid patent.

Third, In adjudging that the defendant had infringed the said reissued letters-patent No. 1904, and upon the exclusive rights of the complainants under the same.

Fourth, In awarding an account of profits and a perpetual injunction against the defendant, according to the prayer of the bill.

The history of the invention and the facts bearing upon the questions involved are fully set forth in the opinion of the court.

Mr. Henry Baldwin, Jr., for the appellant.

It is a well-settled and universally accepted rule of law, that while a patent is *prima facie* evidence that the patentee was the original and first inventor of what is therein described as his improvement, such presumption in no case extends further back than to the date of filing the original application. When-

ever he intends to show that the invention was made prior to that date, he must prove that he made it at the period suggested, and that he reduced the same to practice in an operative machine. *Johnson* v. *Root*, 2 Fish. 297; *White* v. *Allen*, 2 Cliff. 228; *Wing* v. *Richardson*, id. 450; 2 Fish. 444, 537.

The reissued letters-patent are void for want of patentable novelty in the subject-matter. There is clearly nothing in this case to avoid the rule so definitely settled in *Hotchkiss* v. *Greenwood*, 11 How. 264, 267, which has been reaffirmed in *Tucker* v. *Spaulding*, 13 Wall. 453; *Hicks* v. *Kelsey*, 18 id. 670; *Rubber-Tip Pencil Co.* v. *Howard*, 20 id. 498; *Smith* v. *Nichols*, 21 id. 119; *Roberts* v. *Ryer*, 91 U. S. 159; *Brown* v. *Piper*, id. 39, 41.

While the original patent described and claimed a mode of making the plate and gums of rubber or other elastic material, — a mode not only never practised, but impracticable, — the reissue describes and claims a plate, or a plate and gums, made by a method not indicated or suggested in the original patent, and yet the only known method by which such a thing can be made.

The reissue entirely discards the mode or process described in the original patent. The product is not only the result of a process radically different from that described in the patent, but includes a substantially different element — gum, teeth — from that there suggested.

Even if it had been proved that Cummings's invention included the product and process described in the reissue, yet such proof, *aliunde* the original record, would not warrant such a change in the thing patented as is found in this reissue. *Sarven* v. *Hall*, 5 Fish. 419; *Carhart* v. *Austin*, 2 Cliff. 530, 536.

It is submitted that the reissue is void under the rule of law, so definitely settled by this court, as to the effect of less glaring differences than are presented in this instance between the original and reissued patents. *Gill* v. *Wells*, 22 Wall. 23, 24.

The appellant submits that the record proves that Cummings absolutely withdrew his application of 1855 on the 17th of January, 1859, when he applied for his papers, and that this

withdrawal was consummated on the 20th of January, when the office returned him the thin drawing.

It is impossible to connect his application of March 25, 1864, with the former application, which, if not withdrawn, remained, and still remains, in the Patent Office complete and susceptible of prosecution; and if it had been prosecuted without reference to the application of 1864, and a patent obtained upon it even after the patent of 1864 was issued, the later patent would have superseded the earlier one, because, though earlier in issue, it was subsequent in date of application. *Suffolk Co.* v. *Hayden*, 3 Wall. 315.

When, after eight years of entire inaction and acquiescence in the third rejection by the office, Cummings again appeared before the Patent Office, he did so with an entirely new case, — petition, specification, drawings, and model, — and, without any reference to his former application, paid the fee required by the then existing law upon the new case.

His drawings in 1864 were different from those of 1855, showing gum-teeth, and having four figures instead of three.

He could not have included these changes in a renewal of his application of 1855, as the addition of subsequent improvements was then prohibited by the statute. Act of 1861, sect. 9.

Nor does this case fall within the rule announced in *Godfrey* v. *Eames*, 1 Wall. 217.

It is insisted that the inaction of Cummings and his acquiescence in the rejections of his original application amount to an abandonment thereof; and that the alleged invention having been in public use and on sale for more than two years prior to his application for the letters of June 7, 1864, the reissue is invalid.

Mr. E. N. Dickerson and *Mr. B. F. Lee, contra.*

MR. JUSTICE STRONG delivered the opinion of the court.

A brief review of the history and nature of the patent which the complainants allege has been infringed will aid materially in solving the questions presented by this appeal. On the fourteenth day of May, 1852, Dr. John A. Cummings, a dentist of Boston, filed in the Patent Office a caveat to protect an invention he claimed to have made, of certain new and useful im-

provements in the setting and plates of artificial sets of teeth. The description accompanying the caveat indicated with very considerable clearness what the alleged invention was, and the objects sought to be gained by it. The improvement was declared to "consist in forming the plate, and also the gums in which the teeth are inserted, of rubber, or some other elastic substance, so compounded with sulphur, lead, and other similar substances as to form a hard gum, or whalebone gum, rigid enough for the purposes of mastication, and pliable enough to yield a little to the mouth." "By this improvement," the caveator said, "the teeth can be easily baked into the gums which form one piece with the plate." Subsequently, on the 12th of April, 1855, he applied for a patent, reciting in his application that he had previously entered a caveat. His accompanying specification declared the invention to consist in "forming the plate and gums to which the teeth are attached of rubber, or some other elastic material, so indurated as to be rigid enough for the purpose of mastication, and pliable enough to yield a little to the motions of the mouth, and in one piece, the teeth being embedded in the elastic material while the material is in a soft condition, and then baked with the gums and plate, so that the teeth, gums, and plate will all be connected, forming, as it were, one piece." This application for a patent was rejected on the 19th of May next following; and the applicant was referred to two printed publications, one suggesting the use of gutta-percha as a base for artificial sets of teeth, and the other suggesting pastes, analogous to porcelain paste, as well as gutta-percha. Cummings then amended his specification by striking out all reference to gutta-percha or other merely elastic material, disclaiming the use of gutta-percha, and any material which is merely rendered plastic by heat and hardened by cooling, and he claimed the improvement in sets of mineral, or other artificial sets of teeth which consists in combining the teeth with a rubber plate and gums, which, after the insertion of the teeth, are vulcanized by Goodyear's process, or any other process, forming thereby a cheap, durable, and elastic substitute for the gold plates theretofore used. This amendment, however, proved ineffectual. The application for a patent was again rejected; and a third rejection followed, a reconsideration for which the

applicant had asked. This third rejection was on the third day of February, 1856. From that time onward for several years, indeed, until the patent was finally granted, the evidence very satisfactorily shows that Dr. Cummings was in a condition of extreme poverty, utterly unable to bear the necessary expenses of prosecuting his case further. But he did not withdraw his application. He did not ask for a return of part of the fee he had paid, nor by any act of his did he indicate acquiescence in the unfavorable action of the Patent Office. On the contrary, he continued to assert his expectation of ultimately obtaining a patent, formed plans for his own action after it should be obtained, and complained of what he supposed to be the negligence of his solicitor. The proof of his extreme poverty is ample. His ill-health interfered with his working successfully in the line of his profession, and his family was subjected to great privations. He seems never to have had any considerable money. He borrowed, sometimes, small sums to purchase underclothing for himself. He made frequent applications to his friends for advances to enable him to prosecute his application for a patent, offering as a compensation for such advances sometimes one quarter and sometimes one half of the patent when obtained. He appears never to have remitted his efforts until, in 1864, he induced Dr. Flagg, who had been his partner in former years, and Dr. Osgood, to advance, first, $100, and afterwards $720, by means of which the patent was obtained. Even then he had not the $20 necessary to be paid when it was allowed. For the assistance he thus received he gave one quarter of his invention. Before this time, between the third rejection of his application and his obtaining the advances mentioned, every thing was done which was within his power. In February, 1859, in the midst of his pecuniary embarrassments, his solicitor applied to the Patent Office, not for a return of any portion of the fee paid, nor for a withdrawal of the application, but that the specification and one drawing might be sent to him. This request was refused. An attempt was then made for an appeal to the board, but that not being allowed by the commissioner, nothing further was done in the Patent Office until the applicant was enabled, by the funds obtained from Drs. Flagg and Osgood, to

renew his endeavors. Then, on the 1st of March, 1864, he presented a petition for the grant of a patent to himself for the same invention which he had endeavored to secure in 1855 (the application for which remained in the office unwithdrawn), and accompanied his petition with a specification and drawings corresponding exactly with those he had previously made. This final effort was successful. The office practically acknowledged that the prior rejection had been an error, and declared, that, in justice to his rights as an inventor, the admission of his claim, limited to the use of hard rubber or vulcanite, as he had before limited it, would not be objected to. Accordingly the patent was granted on the 7th of June, 1864, and by sundry conveyances it subsequently became vested in the complainants. Two surrenders and reissues have since been made, the last dated March 21, 1865, and it is for an alleged infringement of this second reissue that the present suit has been brought. The bearing of this history upon the merits of the controversy will appear as we proceed to examine the several defences set up.

Among these the one perhaps most earnestly urged is the averment that the device described in the specification was not a patentable invention, but that it was a mere substitution of vulcanite for other materials, which had previously been employed as a base for artificial sets of teeth, — a change of one material for another in the formation of a product. If this is in truth all that the thing described and patented was, if the device was merely the employment of hard rubber for the same use, in substantially the same manner and with the same effect that other substances had been used for in the manufacture of the same articles, it may be conceded that it constituted no invention. So much is decided in *Hotchkiss* v. *Greenwood*, 11 How. 248. But such is not our understanding of the device described and claimed. In the specification, it is declared that the invention "consists in forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber, or vulcanite, so called, an elastic material, possessing and retaining in use sufficient rigidity for the purpose of mastication, and at the same time being pliable enough to yield a little to the motions of the mouth." This is immediately followed by a description of the manner of the proposed use; that is, of making the hard rub-

ber plates: and the claim, as stated, is "the plate of hard rubber, or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described;" that is, plainly, formed as described. The invention, then, is a product or manufacture made in a defined manner. It is not a product alone separated from the process by which it is created. The claim refers in terms to the antecedent description, without which it cannot be understood. The process detailed is thereby made as much a part of the invention as are the materials of which the product is composed. We shall not quote at large the description of the mode of making the plate. Such a quotation would unnecessarily prolong this opinion. It plainly shows a purpose of the inventor to secure what had not been secured before, — a combination of a plate with artificial teeth, or with gums and teeth, in such a manner as to be free from the objections and defects or inconveniences attending the method before practised of attaching such teeth to a metallic plate fitted to the roof of the mouth. Some of these objections are stated; such as expense, hurting the mouth, impeding mastication, and obstruction to perfect articulation. In carrying out the purpose proposed, the materials employed were all old. The teeth, the wax, the plaster, the moulds, the soft rubber, and the hard rubber, were none of them new. It is also true that the steps in the process were not all new. Plaster had been used for formation of moulds. The process of forming a plate by the use of such moulds was well known, and so was the process of converting a vulcanizable compound into vulcanite by heating it and allowing it to cool in moulds. But the process of Dr. Cummings extended beyond the use of known materials and the employment of the processes mentioned. It was vulcanizing soft rubber in a mould, and in contact with artificial teeth inserted in place into it while it remained in a soft condition. It was well described by the circuit judge as "the making of a vulcanite dental plate out of a vulcanizable compound, into which the teeth were embedded in its plastic condition, and the rubber compound, with the teeth thus embedded in it, afterwards vulcanized by heat, so that the teeth, gums, and plate should be perfectly joined without any intervening crevices, and the plate should possess the

quality of hard rubber or vulcanite." The combination thus resulted in a manufacture which was "one piece." If, then, the claim be read, as it should be, in connection with the preceding part of the specification, and construed in the light of the explanation which that gives, the invention claimed and patented is "a set of artificial teeth as a new article of manufacture, consisting of a plate of hard rubber, with teeth, or teeth and gums, secured thereto in the manner described in the specification, by embedding the teeth and pins in a vulcanizable compound, so that it shall surround them while it is in a soft state, before it is vulcanized, and so that when it has been vulcanized the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece." It is evident this is much more than employing hard rubber to perform the functions that had been performed by other materials, such as gold, silver, tin, platinum, or gutta-percha. A new product was the result, differing from all that had preceded it, not merely in degree of usefulness and excellence, but differing in kind, having new uses and properties. It was capable of being perfectly fitted to the roof and alveolar processes of the mouth. It was easy for the wearer, and favorable for perfect articulation. It was light and elastic, yet sufficiently strong and firm for the purposes of mastication. The teeth, gums, and plate constituting one piece only, there were no crevices between the teeth and their supporters into which food could gather, and where it could become offensive, and there could be no such crevices so long as the articles lasted. They were unaffected by any chemical action of the fluids of the mouth. Besides all this, they were very inexpensive as compared with other arrangements of artificial teeth. To us it seems not too much to say that all these peculiarities are sufficient to warrant the conclusion that the device was different in kind or species from all other devices. We cannot resist the conviction that devising and forming such a manufacture by such a process and of such materials was invention. More was needed for it than simply mechanical judgment and good taste. Were it not so, hard rubber would doubtless have been used in the construction of artificial sets of teeth, gums, and plates long before Cummings

applied for his patent. To find a material, with a mode of using it, capable of being combined with the teeth in such a manner as to be free from the admitted faults of all other known combinations, had been an object long and earnestly sought. It had been a subject for frequent discussion among dentists and in scientific journals. The properties of vulcanite were well known; but how to make use of them for artificial sets of teeth remained undiscovered, and apparently undiscovable, until Cummings revealed the mode. But when revealed its value was soon recognized, and no one seems to have doubted that the resulting manufacture was a new and most valuable invention. The eminent dentists and experts examined in this case uniformly speak of it as such. Not one has ventured to testify that it was not an invention. They speak of it as "a novel and desirable thing;" as "the greatest improvement in dentistry" made in many years; and as an invention which is "a great benefaction to mankind, whereby both health and comfort are promoted." The evidence also shows that it has wrought a revolution in dental practice, and that many thousands of operators are using it in preference to older devices. All this is sufficient, we think, to justify the inference that what Cummings accomplished was more than a substitution of one material for another; more than the exercise of mechanical judgment and taste, — that it was, in truth, invention. Undoubtedly, the results or consequences of a process or manufacture may in some cases be regarded as of importance when the inquiry is, whether the process or manufacture exhibits invention, thought, and ingenuity. Webster, on the subject-matter of patents, page 30, says: "The utility of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention; and since the one cannot exist without the other, the existence of the one may be presumed on proof of the existence of the other. Where the utility is proved to exist in any degree, a sufficiency of invention to support the patent must be presumed." We do not say the single fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be

considered; and, when the other facts in the case leave the question in doubt, it is sufficient to turn the scale.

We have, therefore, considered this branch of the case without particular reference to *Hotchkiss* v. *Greenwood*, 11 How. 248. The patent in that case was for an improvement in making door and other knobs for doors, locks, and furniture, and the improvement consisted in making them of clay or porcelain, in the same manner in which knobs of iron, brass, wood, or glass had been previously made. Neither the clay knob nor the described method of attaching it to the shank was novel. The improvement, therefore, was nothing more than the substitution of one material for another in constructing an article. The clay or porcelain door-knob had no properties or functions which other door-knobs made of different materials had not. It was cheaper, and perhaps more durable; but it could be applied to no new use, and it remedied no defects which existed in other knobs. Hence it was ruled that the alleged improvement was not a patentable invention. The case does decide that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of the product. But this is all. It does not decide that no use of one material in lieu of another in the formation of a manufacture can, in any case, amount to invention, or be the subject of a patent. If such a substitution involves a new mode of construction, or develops new uses and properties of the article formed, it may amount to invention. The substitution may be something more than formal. It may require contrivance, in which case the mode of making it would be patentable; or the result may be the production of an analogous but substantially different manufacture. This was intimated very clearly in the case of *Hicks* v. *Kelsey*, 18 Wall. 670, where it was said, "The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, as increase of efficiency, or a decided saving in the operation, be obtained." But where there is some such new and useful result, where a machine has acquired new functions and useful properties, it may be patentable as an invention, though

the only change made in the machine has been supplanting one of its materials by another. This is true of all combinations, whether they be of materials or processes. In *Crane* v. *Price*, 1 Webst. Pat. Cas. 393, where the whole invention consisted in the substitution of anthracite for bituminous coal in combination with a hot-air blast for smelting iron ore, a patent for it was sustained. The doctrine asserted was, that if the result of the substitution was a new, a better, or a cheaper article, the introduction of the substituted material into an old process was patentable as an invention. This case has been doubted, but it has not been overruled; and the doubts have arisen from the uncertainty whether any new result was obtained by the use of anthracite. In *Kneass* v. *Schuylkill Bank*, the use of steel plates instead of copper for engraving was held patentable. So has been the flame of gas instead of the flame of oil to finish cloth. These cases rest on the fact that a superior product has been the result of the substitution, — a product that has new capabilities and that performs new functions. So in the present case the use, in the manner described, of hard rubber in lieu of the materials previously used for a plate produced a manufacture long sought but never before obtained, — a set of artificial teeth, light and elastic, easily adapted to the *contour* of the mouth, flexible, yet firm and strong, consisting of one piece, with no crevices between the teeth and the plate, impervious to the fluids of the mouth, unaffected by the chemical action to which artificial teeth and plates are subjected when in place, clean and healthy, — peculiarities which distinguish it from every thing that had preceded it. These differences, in our opinion, are too many and too great to be ascribed to mere mechanical skill. They may justly be regarded as the results of inventive effort, and as making the manufacture of which they are attributes a novel thing in kind, and consequently patentable as such.

A second objection urged by the defendant against the validity of the complainant's patent is alleged want of novelty of the invention; and a strenuous effort has been made to convince us, that, although hard rubber had not been used in the manner described for the production of the manufacture, equivalent materials and processes had been, and that a plate

substantially the same as that of Dr. Cummings had been made before his improvement. We are not, however, convinced. The patent itself is *prima facie* evidence that the patentee was the first inventor, at least it casts upon him who denies it the burden of sustaining his denial by proof. We do not find such proof in the case. Though the patent was not granted until June 7, 1864, the invention was completed at least as early as April 12, 1855, when the application for a patent was made. Indeed, as we have noticed, a caveat to protect it was filed on the 14th of May, 1852, which clearly foreshadowed the invention. Yet taking the spring of 1855 as the time when it was completed, we find nothing in the proofs to justify a conclusion that Dr. Cummings was not the first inventor. It would answer no good purpose to review the voluminous evidence supposed to bear upon this branch of the case. We shall refer only to that which is deemed most important, and which has been most pressed upon us in this argument. Of the English patent of Charles Goodyear it is enough to say, that, though the provisional specification was filed March 14, 1855, the completed specification was not until the 11th of September following. It was, therefore, on the last-mentioned date that the invention was patented.

The experiments made by George E. Hawes, it must be admitted, closely resembled the process described in the reissued patent to the complainants. He cast in moulds sets of teeth on a tin base, in a manner very like that in which the vulcanite plate is formed by the Cummings process. But the experiments resulted in nothing practical. Hawes cast sets of teeth for the lower jaw only, the weight of the metal making the plate unfit for the upper. In consequence of the shrinkage of the metal in cooling, a tight joint could not be obtained between the teeth and the base. The sets were, therefore, liable to become offensive in consequence of deposits of food and the secretions of the mouth in the crevices. The shrinkage also prevented a close fitting of the plate to the roof of the mouth, and the tin base was affected by the chemical action of the secretions. In consequence of these and other objections the manufacture was soon abandoned, and it may properly be considered an abandoned experiment. It not only was not the same manufacture as that

of Cummings, but it was not suggestive of it; and Dr. Hawes, who cast the tin plates, testifies that the use of vulcanite for dental purposes is the greatest improvement in his profession that he knew of in twenty-five years. He adds, "that vulcanite may be used by dentists in many ways which could not be accomplished by tin or platinum." In his opinion, therefore, the cast-tin base was not substantially the same thing as the Cummings manufacture. So, also, Dr. Royce, who cast plates of tin for artificial teeth in a manner very similar to that of Dr. Hawes, testifies that the solid tin base was found practically unfit for the purpose, except in rare instances. He made but a few sets, none after 1850, and adopted the vulcanite, agreeing to pay for a license to use it in manufacturing dental plates.

We need go no farther into a consideration of the various devices and publications offered to show that the manufacture patented was known before Cummings invented it. Suffice it to say, that none of them, in our opinion, suggest or exhibit in substance such a manufacture. The defence of want of novelty is, therefore, not sustained.

It is further insisted by the defendant that the reissued patent on which this suit is founded is not a patent for the same invention which was described in the specification of the original patent, and, therefore, that the reissue is unauthorized and void. To sustain this position the defendant must overcome the presumption against him arising from the decision of the Commissioner of Patents in granting the issue; and this he can do only by showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter. This must plainly appear before we can be justified in pronouncing the reissued patent void. But this, in our judgment, does not appear. The first specification describes a set of artificial teeth having a hard-rubber plate made by a process substantially the same as that indicated in the later patent. The description of the process is not quite so minute; but it is sufficiently full to be understood, and to enable an operator to make the manufacture. Certainly it is not another process; and as its result is the same, it is impossible to hold that the reissued patent is for a different invention from the one protected

by the original patent. It is true, the specification of the reissue describes also another process not described in the specification of the first, — namely, a mode of making the moulds, — but that is not claimed as a part of the invention.

The remaining defences to the bill rest mainly on the assumption that the new petition presented to the Patent Office in 1864 cannot be regarded as a continuation of the application made for a patent on the 12th of April, 1855. But this cannot be conceded. The history of the application, as we have given it, forbids such an assumption. No act of Cummings amounted to a withdrawal of his first petition, or to an acquiescence in its rejection. It is true, he filed a second petition in 1864; but he accompanied it with substantially the specification that remained in the office, and with the same drawings. It was a mode of procuring another consideration of his rejected claim; and the commissioner regarded it as such. The act of March 2, 1861, gave him authority thus to regard it. He replied to the application, that his claim was embraced in an application filed by him in 1855, and rejected for want of novelty, admitted that it had been improperly rejected, and suggested an amendment to make it correspond with his former amended claim. It is impossible, in view of these facts, to regard the effort to obtain a new patent in 1864 as a new and independent application, disconnected from the application made in 1855. It was but one stage in a continuous effort. In *Godfrey* v. *Eames*, 1 Wall. 317, the first application was actually withdrawn, and a new petition was presented at the time of the withdrawal, with a different description of the invention; but as the thing patented under the second might have been engrafted as an amendment of the first, it was ruled that all the proceedings constituted one application. This court said, "If a party choose to withdraw his application for a patent, and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly does so, the two petitions are to be considered parts of the same transaction, and both as constituting one continuous application." We are not aware that filing a second petition for a patent, after the first has been rejected, has ever been regarded as severing the second application from the first and depriving the applicant of any advantage he would have enjoyed

had the patent been granted without a renewal of the application. The contrary was decided by the Circuit Court for the Southern District of Ohio, in *Bell* v. *Daniels*, 1 Fish. 372, and in *Blandy* v. *Griffith et al.*, 3 id. 609; and these decisions are founded in justice and sound reason.

If, then, as we think it must be held, the proceeding to obtain the patent was a continuous one from 1855 until it was granted; if the application of 1855 is not severable from the proceedings of 1864, — there is no foundation whatever for the allegation that the invention was abandoned to the public, and that it was in public use or on sale for more than two years before the inventor's application. The first use of it proved, by any other than Dr. Cummings, was in 1859; and there is no evidence that this was with his consent. And the proof respecting his health and pecuniary condition, together with his constant efforts to obtain the necessary means to prosecute his right, rebuts all presumption that he ever abandoned, actually or constructively, either his invention or his application for a patent. That he never intended an abandonment of his invention is perfectly clear; and it was not his fault that granting the patent was so long delayed.

The conclusion of the whole matter is, that the patent is a valid one; and, therefore, that the decree of the Circuit Court should be affirmed. *Decree affirmed.*

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE MILLER and MR. JUSTICE FIELD, dissenting.

I dissent from the judgment of the court in this case, on the ground that the patentee, having duly made his application for a patent in 1855, and the same having been three times rejected, must be considered as having abandoned the same, inasmuch as no further effort was made to obtain a patent until eight years afterwards, without any pretence that the patentee was engaged in perfecting his invention, and in the mean time the invention which he claims as his had come into general public use. The application for a patent made in 1864 was a new and independent application, and should be treated as such. As the public had enjoyed the use of the invention for more than two years prior to this application, the patent should be declared invalid.

Great injustice will, in my judgment, be done to the public to allow a patent obtained under such circumstances to stand. The public had a right to suppose that no further application would be made. The levy of a tribute now on all the dentists of the country who have brought the plate into public notice and use seems to me a species of injustice. The delay of the patentee, in fact, is made to operate to his benefit instead of his prejudice, his patent being made to run eight years longer than it would have done had it been granted when first applied for; so that the public is still further injured by sustaining the patent as finally granted. It is too common a case that associated companies, in order to maintain some valuable monopoly, look about to see what abandoned invention or rejected application, or ineffective patent, can be picked up, revamped, and carried through the Patent Office, and by the aid of ingenious experts and skilful counsel succeed in getting the desired protection. I think that the courts ought to be strict in maintaining the rights of the public in such cases. And the present case seems to me to be one in which we ought to hold the patent invalid as against those rights.

COUNTY OF RANDOLPH *v.* POST.

1. A company is none the less a railroad company, within the meaning of the act of the general assembly of the State of Illinois, approved Nov. 6, 1849, authorizing counties to subscribe to the capital stock of railroad companies, because its charter vests it with power to carry on, in addition to the business of such a company, that of a coal, or a mining, or a furnace, or a manufacturing company.
2. It would be an unreasonable restriction of the rights and powers of a municipal corporation to hold that it cannot waive conditions found to be injurious to its interests, or, like other parties to a contract, estop itself.
3. A county in Illinois, a subscriber to the stock of a railway company, agreed to extend the time for completing the road from that originally fixed to a particular date. Before that date, the county, by its proper officers, declared the road completed to its satisfaction, delivered its bonds, and received the stock of the company in return therefor. *Held*, that its action constitutes a waiver and an estoppel which prevent it from raising the objection that the contract was not performed in time.
4. The bonds issued by the county court of Randolph County, Ill., bearing date Jan. 1, 1872, and reciting that they are issued in payment of a subscrip-

tion of $100,000 to the capital stock of the Chester and Tamaroa Coal and Railway Company, in pursuance of an election held by the legal voters of said county, on the sixth day of June, 1870, and by virtue of the provisions of an act of the general assembly of the State of Illinois, entitled "An Act supplemental to an act to provide for a general system of railroad corporations," are, with the coupons thereto attached, valid, and binding upon the county.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of assumpsit on certain coupons attached to bonds issued by the county of Randolph, in payment of a subscription of $100,000 to the capital stock of the Chester and Tamaroa Coal and Railway Company.

On the 3d of May, 1870, the county court of Randolph County, at a special term thereof, passed an order, which provided that the question of such subscription be submitted to the legal voters of the county; that until the railroad of the company should be built, and cars run thereon from within the corporate limits of the city of Chester to the line of the county, no bonds should be registered or paid; and that no bonds should be registered or paid unless the said railroad should be completed from Chester to that line within eighteen months from the time of subscription.

At an election, held June 6, 1870, the vote resulted in favor of the subscription. The county thereupon, on the twenty-seventh day of that month, made its subscription on the books of the company. On July 26, 1870, the county court ordered that the bonds be executed and placed in the hands of certain trustees. On Aug. 17 following, it modified that order, by directing that the bonds be executed only at a regular term of the court; and again, on the 6th of September, 1871, further modified it, by requiring the judge and clerk of the court to execute them, attach its seal thereto, and deliver them to the trustees, and that the company should issue to the latter a certificate of stock to the amount of $100,000; which was accordingly done.

On the 6th of October, 1871, upon the representation of the president of the company and others, that the work on said railroad was far advanced toward completion through the county of Randolph, but that from unavoidable difficulties of

transportation, caused by unprecedented low water in the rivers, the company found itself unable to get its iron upon the ground in the time contemplated by the previous orders of the county court, the latter made an order, which, after reciting those before issued, concluded as follows: —

"Whereas, the time for completing said road will expire on the twenty-seventh day of December, 1871, and it appearing that said company are doing all they can to complete said road within said time, it is therefore ordered by the court that the time for completion of said railroad be extended to the first day of February, A.D. 1872, and that, in case said road shall be completed, and cars shall have run thereon, from within the corporate limits of the city of Chester to the county line between the counties of Randolph and Perry, by the first day of February, A.D. 1872, the said trustees shall deliver said bonds to said company, or their authorized agent, and shall deliver said certificate of stock to said county court or their order."

Plaintiff proved that the road was built and completed within the time required by the county court through the county of Randolph, according to contract; that it was upon its completion, and ever since has been, in full operation, with trains of cars carrying freight and passengers as a common carrier through said county, on the line prescribed by the contract; that said bonds were not issued and delivered to said railroad company until after the officers of said county had gone over said railroad in the cars of said company through said county, and expressed themselves satisfied with the construction of said railroad.

The bonds were delivered to the company Jan. 19, 1872. The coupons sued on were as follows, differing only in the time of maturity and number of the bond to which each was attached: —

"COUNTY OF RANDOLPH, STATE OF ILLINOIS:

"The county of Randolph will pay to the bearer, on the first day of July, 1872, at the agency of the State treasurer, in the city of New York, forty dollars, it being one year's interest on bond No. 183, for $500.

"JOHN R. SHANNON,
"*County Clerk of Randolph Co.*"

The bonds were in the following form: —

"UNITED STATES OF AMERICA.

"*State of Illinois, Randolph County.*

"No. 1.] RAILROAD BOND. [$500.

"Know all men by these presents, that the county of Randolph, State of Illinois, is indebted to the Chester and Tamaroa Coal and Railway Company, or bearer, in the sum of $500, lawful money of the United States, with interest from date, at the rate of eight per cent per annum, payable annually on the first day of July in each year, at the agency of the State treasurer, in the city of New York, on the presentation and surrender of the respective interest-coupons hereto annexed.

"The principal of this bond shall be due and payable ten years from the date hereof, at said agency of State treasurer, in New York.

"This bond is one of a series of bonds issued by the county of Randolph in payment for $100,000 of the capital stock of the Chester and Tamaroa Coal and Railway Company, in pursuance of an election held by the legal voters of Randolph County, Ill., on the sixth day of June, 1870, and by virtue of the provisions of an act of the general assembly of the State of Illinois entitled, 'An Act supplemental to an act to provide for a general system of railroad corporations.'

"And for the payment of said sum of money and accruing interest thereon in the manner aforesaid the faith of the county of Randolph is hereby irrevocably pledged, as also property, revenue, and resources.

"In testimony whereof, the county court of said county of Randolph have caused these presents to be signed by the county judge and by the clerk of the county court of said county, and sealed with the seal of said court, at Chester, Ill., in said county, on this first day of January, A.D. 1872.

"ALEXANDER WOOD, *County Judge.*

"JOHN R. SHANNON, *County Clerk.*"

The act of the general assembly, referred to in the bonds, is, together with the provision of the constitution bearing upon the case, set forth in the opinion of the court.

The case was, by agreement, tried by the court below without the intervention of a jury. Judgment was rendered

for the plaintiff; whereupon the county sued out this writ of error.

Submitted on printed argument by *Mr. John M. Palmer* for the plaintiff in error.

The county of Randolph had no authority to subscribe to the capital stock of the Chester and Tamaroa Coal and Railway Company. *Kenicott* v. *Supervisors*, 16 Wall. 452.

That corporation was not a "railroad company" within the meaning of the act of the general assembly of Illinois of Nov. 6, 1849, which confers authority upon counties to become shareholders only in corporations organized solely for the construction of railroads.

If, from the nature of this corporation, the county could not become the purchaser of shares of its capital stock, and participate in all its doings to the extent that private individuals might, every other fact or circumstance in its conduct or acts, or in those of the people of the county, or of their officers, imposes no liability and creates no estoppel.

The argument that a county may bind itself to secure the construction of a railroad, without becoming a subscriber to, or a purchaser of shares of, the capital stock of the company by which it is constructed, assumes that a county may issue bonds in aid of such construction, without reference to the act of 1849, or, in other words, that it may do so without law; for that act alone is recited in the bonds, and relied on to sustain their validity.

The argument, that the bonds and coupons sued on are valid because the proceeds were used in the construction of a railroad, not only rests on a fact which is not alleged nor proved, but impliedly concedes their invalidity, if the proceeds had been otherwise used, and thus deprives them of the character of commercial paper claimed for them, reduces them to the class of simple contracts, and renders it necessary to prove the consideration upon which they were given.

To assert that a county may own stock in a corporation, to the extent of participating in the exercise of some but not all of the powers of a stockholder, is to disregard the statute, as well as the general principles of law.

But even if the subscription was made by proper authority, it

was a contract between the county and the railroad corporation. The constitution of the State, which took effect July 2, 1870, deprived the county of all power in respect to such contracts, beyond what was necessary to enable it to complete them according to the measure of its duty as therein defined, and incapacitated it to assume new obligations, or to waive any of the conditions upon which its duty to issue bonds was by contract made to depend. All the powers of the county officers, after the adoption of the constitution, were, with respect to the execution of the contract, merely ministerial, and in no sense discretionary.

The railroad was not completed from within the limits of the city of Chester to the line of Randolph County, within eighteen months from the date of the subscription, as provided by the contract of subscription. The bonds were therefore made by the officers of the county, without authority of law, and are for that reason void.

The test of the soundness of this conclusion is, that the company, by reason of its failure to complete its road within the time and in the manner contemplated by the vote of the people and by the contract pursuant thereto, had no just claim to the bonds; and the officers of the county had no rightful power or authority to issue them.

Mr. S. M. Cullom, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

By consent of the parties, this case was tried by the circuit judge without the intervention of a jury. It resulted in a judgment for the plaintiff below, for the amount of the coupons upon certain bonds issued by the county of Randolph and held by the plaintiff, thus establishing the validity of an issue by said county of bonds in aid of the Chester and Tamaroa Coal and Railway Company. The county, dissatisfied with this result, brings its appeal to this court, and rests its objections upon two principal grounds: —

1. The first allegation of error is, that the issue of these bonds was forbidden by the constitution of the State of Illinois.

A separate article of the constitution of that State provided as follows: —

"No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make a donation, or loan its credit in aid of such corporation: *Provided*, however, that the adoption of this article shall not be construed as affecting the right of any municipality to make such subscriptions when the same have been authorized under existing laws by a vote of the people of such municipality prior to such adoption."

This provision took effect on the 2d of July, 1870. *Richards* v. *Donaghue*, 66 Ill. 73.

If, then, the county of Randolph had been authorized, prior to July 2, 1870, to make the subscription in question, the bonds were valid, so far as this objection is concerned. If it was not so authorized, the subscription was prohibited by the constitution, and the bonds were void. It will be observed that the decision of this point depends not upon the question whether a subscription had in fact been made by a county prior to July 2, 1870, but whether the county had been authorized in the manner specified to make such subscription. The provision does not apply where such subscriptions "have been authorized under existing laws."

The act of the legislature of Illinois, respecting railroad companies, in force prior to the adoption of the constitutional provision, contained the following sections: —

"77. Subscriptions and loans. Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated, under any law of this State, such city or county may and are hereby authorized to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000, for each of such cities or counties; and the stock so subscribed for, or purchased, shall be under the control of the county court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

"78. For the payment of such stock, the judges of the county court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money, at a rate not exceeding ten per cent per annum, and to pledge the faith of the county or city for the annual payment of

the interest, and the ultimate redemption of the principal; or, if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county making such subscription, to be drawn for that purpose, in sums not less than fifty dollars, bearing interest not exceeding ten per cent per annum, provided that no bond shall be paid out at a rate less than par value.

"79. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated, under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company, at par, and in lieu of cash, and to issue their bonds, bearing interest not exceeding ten per cent per annum, for any money by them borrowed for the construction of their railroad and fixtures, or for the purchase of engines and cars; and for such purpose may dispose of any bonds by them received as aforesaid."

The section following enacts that no such bonds shall be issued unless a majority of the voters of the municipality shall, at an election called for that purpose, sanction such issue. It is not necessary to give the details of this section, as no question exists as to the holding the election on the sixth day of June, 1870, and to the vote thereat, as set forth in the bonds.

The point of the objection here made is, that the Chester and Tamaroa Coal and Railway Company is not a railroad company within the meaning of the general act already cited. It is said that it is a mining and a manufacturing company, and not a railroad company.

By an act of the legislature, passed March 4, 1869, that company was created a corporation, and "vested with all power, privileges, and immunities which are or may be necessary to engage in mining, and to construct, complete, and operate a railroad, with single or double track, commencing at Chester, in Randolph County, Ill., thence running easterly on the most eligible route, *via* Pinckneyville, in Henry County, Ill., to Tamaroa, in said Perry County; and for this purpose said company are authorized to lay out their said railroad, not exceeding one hundred feet in width through the whole length, and, for the purpose of cuttings, embankments, stone, or gravel, may take as much more land as may be necessary for the proper construction and security of said railroad, and shall have power

to extend the same to connect with or cross over any other railroad within the State of Illinois, and may make such lateral or branch road or roads to any coal-lands belonging to said company as they may deem necessary for the successful prosecution of their business; and said company may enter upon and take possession of so much land as may be necessary for the construction and maintenance of said railroad and branches, dépôts, side-tracks, water-stations, engine-houses, machine-shops, and other buildings and appendages necessary to the construction and working of said road; and in case said land be not donated to said company for such purpose, it shall be lawful for said company to proceed to condemn said land, as provided by the laws of the State concerning right of way.

"SECT. 2. The said corporation may take and transport upon said railroad any person or persons, merchandise, or other property, and may fix, establish, take, and receive such rates of toll, for any passenger and property transported upon the same, as the directors shall, from time to time, establish, subject to such limitations and restrictions as are or may be provided by general law.

"SECT. 3. The said corporation is hereby vested with power to purchase, hold, and convey real and personal estate; to give and receive promissory notes; to enter into and carry on all kinds of mechanical and manufacturing business; to erect mills, furnaces, founderies, factories, and machine-shops, for the manufacture of flour, lumber, iron, castings, machinery, farming-utensils, and any other kind or description of article not forbidden by law; and may erect and build marine ways or dry-docks, and use the same for the purposes of repairing and building boats, barges, or any other description of water-craft; may buy, build, and own boats, barges, or other vessels, and navigate the same for the transportation of their coal, manufactures, or for other purposes."

We are at a loss to conceive what words could be used to create a railroad company that are not here used. The persons named are "hereby created a corporation," and authority is given "to construct, complete, and operate a railroad" from Chester, a point in Randolph County on the Illinois Railroad, to Tamaroa, a point on the Mississippi River. They are authorized to extend their road, by lateral branches, to connect with other roads; and the power of eminent domain, to condemn such

land as may be needed for building the railroad, is vested in the corporation.

The corporation is authorized to take and transport upon said road all persons and property, and to fix and establish rates of toll for the transportation of such persons and property.

It is not the less a railroad company within the statute authorizing municipal subscriptions because it is also a coal, or a mining, or a furnace, or a manufacturing company. By the third section of its charter it is vested with large power to carry on various kinds of mechanical and mining business, and is authorized to build and use vessels and barges in the transportation of coal, and for other purposes.

If the legislature had placed great restrictions upon its capacity as a railroad corporation, it might plausibly be objected that the purpose of a municipal subscription to its stock would be so far thwarted. Such purpose is to promote the settlement and increase the business and enhance the value of the property of the municipality and of its citizens by furnishing the means of passage to all wishing to come or to go, and providing a means of bringing in the produce of other regions and of furnishing a market for its own. The vast corn-growing lands of the State of Illinois depend for their value upon their convenience to a market. A few years ago, its rich production was almost valueless, for the want of railroads or canals to carry it to other regions, where it could have been sold to advantage.

No court has authority to say that an operating railroad, is less a railroad, is less valuable to a county through which it passes, because it proposes to mine and transport coal, to manufacture and transport flour, to carry on iron founderies, digging or buying the raw materials, employing men to manufacture them into different kinds of iron or articles of use or luxury, and transporting them as may be required, than if it confined itself to the business of a carrier. So far as the probable success or advantages of such undertakings are concerned, it is not for us to decide upon it. The people of Randolph knew what the powers of the corporation were, and if they thought well of the undertaking, it was a matter for their judgment only. The question of power being settled, the matter of judgment, wisdom, or expediency is not for reconsideration by the courts.

2. The objection is made, secondly, that the subscription of the county was a conditional one, and that the condition was not complied with.

The allegation is, that by the terms of the contract of subscription the road was agreed to be completed and in operation within eighteen months from the date of the subscription, which would be on the twenty-seventh day of December, 1871, and that it was not completed until the nineteenth day of January, 1872.

We do not think the fact upon which this objection is based appears from the record. It is certain that no attention was called to it in the court below, and no ruling there asked or had in relation to it. It is there stated that "the plaintiff proved that the road was built and completed within the time required by the county court of Randolph, according to contract; that it was upon its completion put into operation, and has been ever since and now is in full operation, with trains of cars carrying freight and passengers as a common carrier through said county of Randolph on the line prescribed by the contract. . . . Said bonds were not issued and delivered to said railroad company until said county officers . . . had first rode over said railroad in cars of said company through the county of Randolph, and expressed themselves satisfied with the construction of said railroad."

This plain statement is supposed to be overthrown by the evidence of a petition presented to the county court by the company on the sixth day of October, 1871, in which it is stated that, for reasons there given, it will not be able to complete the road within the time stipulated, and asking an extension from Dec. 27, 1871, until Feb. 1, 1872, and of the order of the county court granting such extension.

This is evidence, no doubt, that the company then believed that it would not be able to complete the road as it had undertaken, and that it desired to guard itself against default, as well as that the county was ready to grant the request. This was, however, ninety days before the expiration of the time stipulated; and it is by no means difficult to believe that the company overcame the existing obstacles. It could not obtain the bonds until the road was completed; and it had the

strongest motive, therefore, not to accept the indulgence of the county, if it was possible to avoid it.

The evidence shows that the bonds had been delivered on the nineteenth day of January, thirteen days before the expiration of the extended time, and that the road was completed and in operation before such delivery. It appears, also, from the citation already made from the record, that the road was built through the county "according to contract." When it is stated in the bill of exceptions that the "plaintiff, to maintain the issue on his part, offered in evidence the contract made by the county court of Randolph County, also the order of the county court extending the time for the completion of the road," it is plain that the distinction between the contract and the order of extension was well understood, and that the statement that the road was found to be completed according to the contract, means within the time and in the manner prescribed by the original contract, and not by the extension.

If the fact assumed is doubtful, we are not called upon to study out a defect for the purpose of overthrowing the judgment, which was not objected to, or in any manner alluded to on the trial.

Should we, however, assume the fact to be as is insisted by the plaintiff in error, it does not follow that its conclusion is correct. The constitutional provision alluded to prohibited all loans to corporations of municipal credits after July 2, 1870. If, however, a subscription for that purpose had already been authorized by a vote of the people, the right to make such subscription was not affected by the prohibition. If not authorized before the date mentioned, the subscription was absolutely prohibited. If previously authorized, the constitution had nothing to do with it. It was as if no such ordinance existed.

We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract. Bigelow on Estoppel, 464; *Moran* v. *Comm'rs*, 2 Black, 722; *Zabriskie* v. *Cleveland*, 23 How. 400; *Pendleton* v. *Avery*, 13 Wall. 297; 1 Dill. Mun. Corp., sects. 375, 383, 385, 398.

In the present case, the county, by an order in writing made on the sixth day of October, 1871, expressly agreed, for reasons satisfactory to itself, to extend the time of completing the road from the twenty-seventh day of December, 1871, to the first day of February, 1872. Before that time, — to wit, on the nineteenth day of January, 1872, — it declared the road to be completed to its satisfaction, delivered its bonds to the company, and received its stock in return, which it still holds and owns. That this constitutes a waiver and an estoppel, which under ordinary circumstances would prevent the obligor from raising the objection that the contract had not been performed in time, the authorities leave no doubt. *Muller* v. *Ponder*, 55 N. Y. 325; *Barnard* v. *Campbell*, id. 457; *McMarler* v. *Bank*, id. 222; *Kelly* v. *Scott*, 49 id. 601; *Dezell* v. *O'Dell*, 3 How. 215; *Grand Chute* v. *Winegar*, 15 Wall. 372; *Mercer Co.* v. *Hackett*, 1 Black, 336; *Gelpcke* v. *Dubuque*, 1 Wall. 175; id. 184; *County of Moultrie* v. *Savings Bank*, 92 U. S. 631; *Converse* v. *City of Fort Scott*, id. 503.

We are of the opinion that the case was well decided, and the judgment is accordingly *Affirmed.*

WHITE ET AL. v. LUNING.

1. The rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance of real estate, will not be enforced, when the instrument would be thereby defeated, and when the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify the land.
2. So far as it relates to the description of the property conveyed, the rule of construction is the same, whether the deed be made by a party in his own right or by an officer of the court.

ERROR to the Circuit Court of the United States for the District of California.

This was an action of ejectment by the defendant in error to recover the possession of certain lands situate in Santa Cruz County, Cal., being a part of the rancho Sal Si Puedes, and containing 1,021¾ acres.

By written stipulation of the parties, the case was tried by the court, which found the following facts: —

First, That the rancho Sal Si Puedes lies partly in the county of Santa Cruz and partly in the county of Santa Clara, and was finally surveyed and patented to the claimants, of whom the said White was one, in the year 1861.

Second, On the eleventh day of April, 1866, said White was the owner of certain portions of the said Sal Si Puedes rancho, and, as such owner, mortgaged the same to the plaintiff herein.

Third, An action was afterwards commenced by the plaintiff herein, in the District Court of the Third Judicial District of the State of California for the county of Santa Cruz, against the said White and other defendants, to foreclose said mortgage; and such proceedings were duly had therein, that on the eleventh day of April, 1866, a judgment of foreclosure and sale was entered therein, whereby, among other things, it was decreed that the mortgaged premises should be sold at public sale by the sheriff of Santa Cruz County, and the proceeds of such sale should be paid over to the plaintiff therein. The premises in controversy were embraced in said mortgage, and in the lands directed to be sold by said decree.

Fourth, That afterwards the said White directed the said sheriff to sell said mortgaged premises in parcels, one of which parcels contained 1,021¾ acres; and said sheriff thereupon, in obedience to said judgment and said directions of said White, on the twentieth day of August, 1866, duly sold said premises in parcels, and at said sale the plaintiff became the purchaser of three of said parcels for the sum of $15,600, the other parcels being sold to other purchasers; which parcels are not separately described in the decree and order of sale, but are embraced in the description therein set forth.

Fifth, That afterwards, and in pursuance of said sale, on the twenty-seventh day of February, 1867, the time for redemption from said sale having elapsed, Albert Jones, sheriff of the county of Santa Cruz, executed, acknowledged, and delivered to the plaintiff his sheriff's deed, wherein it was recited that by a certain judgment of foreclosure and sale, entered in the

District Court of the Third Judicial District of the State of California in and for the county of Santa Cruz, in the action of Nicholas Luning, plaintiff, against William F. White, Frances J. White, Eugene Casserly, and Nicholas McCarty, defendants, on the eleventh day of April, 1866, the said sheriff was commanded to sell at public auction, according to law, to satisfy the said judgment, amounting to $23,968.69, and interest and costs of suit, and expenses of sale.

That in pursuance of a certified copy of the order of sale, duly delivered to the said sheriff, he duly advertised, and sold at public auction, on the twentieth day of August, 1866, at twelve o'clock noon, to the highest bidder, for cash, three several parcels of land to the plaintiff for the sum of $15,600, he being the highest and best bidder therefor, and delivered to him a certificate of sale, as required by law; that the time allowed by law for redemption expired without redemption having been made; that said sheriff, in pursuance of said judgment and of the statute in such case made and provided, for the consideration of $15,600 granted and conveyed to the plaintiff the said three parcels of land firstly, secondly, and thirdly described in said deed.

That the premises sought to be recovered in this action are described in said deed as one of said parcels, as follows: —

"All that tract of land situate in the county of Santa Cruz, being part of the rancho Sal Si Puedes, beginning at a post, marked 'S,' which stands in the old fences on the south boundary of the land of W. F. White, S. 46½° E. $6\frac{8}{100}$ chains, from the east line of White's valley partition; thence, by true meridian (magnetic variation, 15° 30′ E.), along said fence and on said line of partition the following courses: S. 46° 30′ E. $20\frac{47}{100}$ chains, S. 60° 30′ E. $4\frac{13}{100}$ chains, S. 73° E. $4\frac{24}{100}$ chains, S. 77° E. $12\frac{14}{100}$ chains, S. 88½° E. 18 chains, S. 69¼° E. $3\frac{70}{100}$ chains, N. 47½° E. 127 chains, to the north boundary of the rancho Sal Si Puedes on the mountains; thence along said north boundary the following courses: N. 52½° W. $11\frac{10}{100}$ chains, S. 75½° W. $15\frac{90}{100}$ chains, S. 79° W. $11\frac{40}{100}$ chains, N. 20° W. 2 chains, S. 83½° W. $12\frac{80}{100}$ chains, N. 72° W. $13\frac{70}{100}$ chains, N. 22¼° W. $6\frac{20}{100}$ chains, N. 65° W. $5\frac{16}{100}$ chains, N. 59½° W. $7\frac{93}{100}$ chains, N. 42¼° W. $14\frac{71}{100}$ chains, N. 1° E. 11 chains, N. 3° W. $25\frac{80}{100}$ chains, N. 26¾° W. $4\frac{50}{100}$ chains, S. 46¼° W. $77\frac{75}{100}$ chains, to the pasture fence;

thence along said pasture fence the following courses: S. 34° 20′ E. $11\frac{43}{100}$ chains, S. 10° E. $3\frac{16}{100}$ chains, S. 27½° W. $4\frac{71}{100}$ chains, S. 40° W. $2\frac{34}{100}$ chains, S. 65° 50′ W. $4\frac{90}{100}$ chains, S. 47½° W. $4\frac{88}{100}$ chains, S. 72½° W. $10\frac{55}{100}$ chains, S. 89½° W. $5\frac{37}{100}$ chains, S. 65° W. $11\frac{74}{100}$ chains, to a post marked S, from which a forked red oak, 12 inches in diameter, marked 'B. T.,' bears S. 65° W., distant 38 links; thence S. 47° 42′ E. $50\frac{33}{100}$ chains, to a post on the south side of a ravine, and thence S. 41° 37′ E. $17\frac{33}{100}$ chains to the place of beginning, containing 1,021¾ acres."

Sixth, That the post marked "S," being the point of beginning mentioned in said deed, the fence along the line of partition, the mountains, the pasture fence, the forked red oak marked "B. T.," the post on the south side of a ravine, all of which are called for in said deed, are all well known and existing monuments, and are all within the county of Santa Cruz. That the said partition fence does not run to or in the direction of either the north boundary of the rancho Sal Si Puedes or the mountains, but runs nearly parallel thereto, and that the course N. 47½° E. 127 chains is not the course of such partition fence, but is nearly at right angles thereto. That the summit of the first range of mountains is the northerly boundary line between said county of Santa Cruz and said county of Santa Clara, and said summit and said county line are about the distance of 127 chains from the point in said fence where the course N. 47½° E. begins, and in the direction of said course.

That the northerly boundary of said rancho Sal Si Puedes is not in the county of Santa Cruz, but in the county of Santa Clara, on another range of mountains, about three-quarters of a mile beyond the summit of said first range of mountains, and beyond the said county line situate thereon in the same (northerly) direction.

That leaving said fence at the point where the course N. 47½° E. 127 chains begins, and running thence the said course and distance, and all the remaining courses and distances as laid down in said deed, but rejecting the words of the call at the end of said course, "the north boundary of the rancho Sal Si Puedes on," and, "along said north boundary," and changing the last course of the description from S. 41° 37′ E.,

so as to make it read S. 41° 37′ W. $17\frac{28}{100}$ chains to the place of beginning; all other calls, monuments, courses, and distances in said deed completely harmonize, and the lines enclose a tract of land containing $1{,}021\frac{3}{4}$ acres of land situate entirely within the county of Santa Cruz, being the quantity of land called for in said sheriff's deed, and the same tract of land sued for in this action; or, in other words, if, from the point of beginning, the courses and distances of said description contained in said sheriff's deed, being the field-notes of the survey, are followed from the point of beginning, changing east into west in the last course, the lines would close, embracing the said lands, and would correspond with all the other calls and monuments mentioned in the deed, except that there would be a departure at nearly right angles from the fence at the beginning of the call N. $47\frac{1}{2}$° E. 127 chains, and the lines would not extend to, or in any manner correspond with, the north boundary of the rancho Sal Si Puedes.

Seventh, That if the course N. $47\frac{1}{2}$° E. should be continued some three-quarters of a mile beyond the 127 chains called for in the deed, to the north boundary of the rancho Sal Si Puedes, and from that point the remaining courses and distances be run according to the calls in the said sheriff's deed, the line so run would not follow the north line of the rancho other than its general course, nor touch the partition fence, nor correspond with any of the other subsequent calls named in the deed, nor would the lines close, nor would they enclose the land sued for, nor the quantity called for in the deed.

Eighth, That if from the point at the end of the course N. $47\frac{1}{2}$° E. 127 chains the remaining courses and distances should be run as laid down in the said sheriff's deed to the point of beginning of the course "S $46\frac{1}{4}$° W. 77.76 chains to the pasture fence," the said line would run along the summit of the said first mountain range in the same general direction of the county line, but would not follow it; running thence the last-named course and distance, the partition fence would be reached, not in the general course of the county line, but in a course nearly at right angles to the general course of said county line. The pasture fence, and all calls, other than these herein in the sixth and ninth findings named as excepted and

rejected, would be reached by following the courses and distances called for in the said sheriff's deed.

Ninth, That all the calls in the said description cannot be harmonized so as to enclose the premises sought to be recovered, nor any other land; that the call for continuing the line along White's valley partition fence beyond the point where the call for course and distance is "N. 47½° E.," is repugnant and inconsistent; that the call for the northern boundary of the rancho Sal Si Puedes on the mountains is false and mistaken; that the calls to run along that northern boundary till the pasture fence is reached is alike false and mistaken; that without rejecting each of the said false, mistaken, and repugnant calls, the description will not enclose the land in controversy.

That afterwards the defendants entered upon and ousted the plaintiff from said land, and at the commencement of this action were and are still in possession thereof, without any title thereto whatsoever.

The court further found as conclusions of law, —

First, That the said false, mistaken, and repugnant calls in these findings mentioned should be rejected from the said description, and the calls for courses and distances from the starting-point be adopted as descriptive of the lands conveyed by said sheriff's deed, rejecting the said false, mistaken, and repugnant calls therefrom.

Second, That by virtue of said sale and sheriff's deed the title to the land described in the plaintiff's complaint became, and still is, vested in fee-simple absolute in the plaintiff herein, and that the plaintiff is entitled to recover in this action the land and premises described in the complaint by courses and distances, rejecting from the description in the said sheriff's deed the said false, mistaken, and repugnant calls, together with his costs of suit.

The court thereupon gave judgment for the plaintiff.

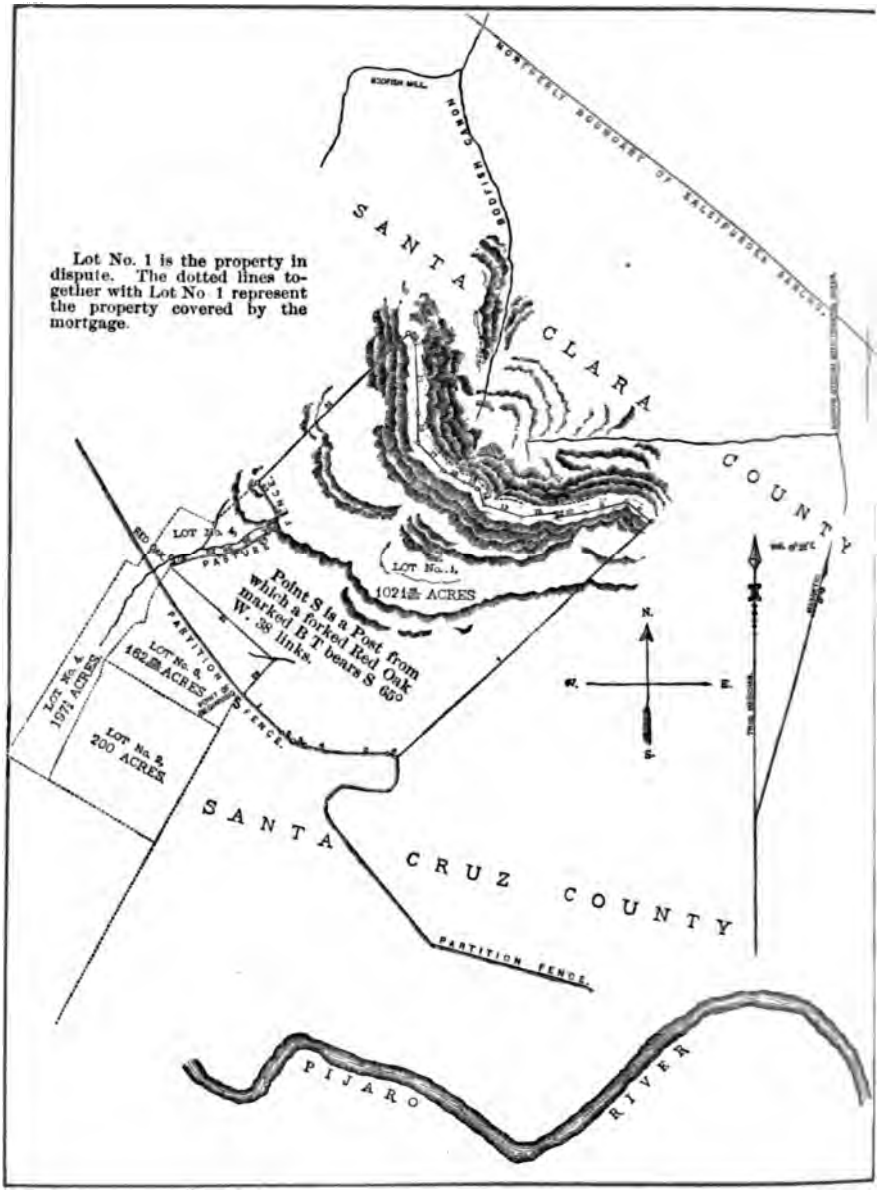
The defendants thereupon sued out this writ, and assign for error in this court the action of the court below in admitting the sheriff's deed to prove title to the land sued for.

The description of the premises as furnished to the sheriff and that contained in the complaint is as follows: —

DESCRIPTION FURNISHED TO THE SHERIFF.	DESCRIPTION IN THE COMPLAINT.
All that tract of land situate in the county of Santa Cruz, being part of the rancho Sal Si Puedes; beginning at a post marked S, which stands in the old fences on the south boundary of the land of W. F. White, south 46½° east $\frac{8}{100}$ chains from the east line of White's valley partition; thence, by true meridian (magnetic variation 15° 30′ east), along said fence and on said line of partition the following courses: —	All that tract of land situate in the county of Santa Cruz, being part of the rancho Sal Si Puedes; beginning at a post marked S, which stands in the old fences on the south boundary of the land of W. F. White, south 46½° east 6.06 chains from the east line of White's valley partition; thence, by true meridian (magnetic variation 15° 30′ east), along said fence and on said line of partition the following courses: —
1. South 46° 30′ east 20 $\frac{47}{100}$ chains.	South 46° 30′ east 20.47 chains.
2. South 60° 30′ east 4 $\frac{12}{100}$ chains.	South 60° 30′ east 4.12 chains.
3. South 73° east 4 $\frac{24}{100}$ chains.	South 73° east 4.24 chains.
4. South 77° east 12 $\frac{14}{100}$ chains.	South 77° east 12.14 chains.
5. South 88½° east 18 chains.	South 88½° east 18 chains.
6. South 69¼° east 3 $\frac{70}{100}$ chains; thence	South 69¼° east 3.70 chains; thence
7. North 47½° east 127 chains *to the north boundary of the rancho Sal Si Puedes on the mountains;* thence *along the said north boundary* the following courses: —	North 47½° east 127 chains; thence the following courses: —
8. North 52½° west 11 $\frac{10}{100}$ chains.	North 52½° west 11.10 chains.
9. South 75½° west 15 $\frac{90}{100}$ chains.	South 75½° west 15.90 chains.
10. South 79° west 11 $\frac{40}{100}$ chains.	South 79° west 11.40 chains.
11. North 20° west 2 chains.	North 20° west 2 chains.
12. South 83½° west 12 $\frac{80}{100}$ chains.	South 83½° west 12.80 chains.
13. North 92° west 13 $\frac{70}{100}$ chains.	North 72° west 13.70 chains.
14. North 22½° west 6 $\frac{20}{100}$ chains.	North 22½° west 6.20 chains.
15. North 65° west 5 $\frac{16}{100}$ chains.	North 65° west 5.16 chains.
16. North 59½° west 7 $\frac{93}{100}$ chains.	North 59½° west 7.93 chains.
17. North 42½° west 14 $\frac{71}{100}$ chains.	North 42½° west 14.71 chains.
18. North 1° east 11 chains.	North 1° east 11 chains.
19. North 3° west 25 $\frac{90}{100}$ chains.	North 3° west 25.90 chains.
20. North 26¾° west 4 $\frac{50}{100}$ chains.	North 26¾° west 4.50 chains.
21. South 46¼° west 77 $\frac{75}{100}$ chains to the pasture fence; thence along the pasture fence the following courses: —	South 46¼° west 77.76 chains to the pasture fence; thence along the pasture fence the following courses: —
22. South 34.20° east 11 $\frac{43}{100}$ chains.	South 34.20° east 11.43 chains.

BOUNDARIES OF LOT NO. 1.

NO.	COURSE.	DIST.	NO.	COURSE.	DIST.
1	S. 46½ E.	20.47	17	N. 42¼ W.	14.71
2	S. 60½ E.	4.12	18	N. 1° E.	11.00
3	S. 78 E.	4.24	19	N. 3 W.	25.90
4	S. 77 E.	12.14	20	N. 26¾ W.	4.50
5	S. 88½ E.	18.00	21	S. 46¼ W.	77.76
6	S. 69¼ E.	3.70	22	S. 34⅓ E.	11.43
7	N. 47½ E.	127.00	23	S. 10 E.	3.76
8	N. 52½ W.	11.10	24	S. 27½ W.	4.71
9	S. 75½ W.	15.90	25	S. 40 W.	2 36
10	S. 79 W.	11.40	26	S. 69⅝ W.	4.90
11	N. 20 W.	2.00	27	S. 47½ W.	4.86
12	S. 83½ W.	12.80	28	S. 72½ W.	10.55
13	N. 72 W.	13.70	29	S. 39½ W.	5.27
14	N. 22¼ W.	6.20	30	S. 69 W.	11.74
15	N. 65 W.	16.00	31	S. 47.42 E.	50.52
16	N. 59½ W.	7.93	32	S. 41.37 W.	17.32



[See Table on the reverse.]

23.	South 10° east $3\frac{16}{100}$ chains.	South 10° east 3.16 chains.
24.	South 27½° west $4\frac{71}{100}$ chains.	South 27½° west 4.71 chains.
25.	South 40° west $2\frac{36}{100}$ chains.	South 40° west 2.36 chains.
26.	South 65.50° west $4\frac{90}{100}$ chains.	South 65.50° west 4.90 chains.
27.	South 47½° west $4\frac{86}{100}$ chains.	South 47½° west 4.86 chains.
28.	South 72½° west $10\frac{55}{100}$ chains.	South 72½° west 10.55 chains.
29.	South 89½° west $5\frac{27}{100}$ chains.	South 89½° west 5.27 chains.
30.	South 65° west $11\frac{74}{100}$ chains to a post marked S, from which a forked red oak, 12 inches in diameter, marked "B. T.," bears south 65° west, distant 38 links; thence	South 65° west 11.74 chains to a post marked S, from which a forked red oak, 12 inches in diameter, marked "B. T.," bears south 65° west, distant 38 links; thence
31.	South 47° 42′ east $50\frac{52}{100}$ chains to a post on the south side of a ravine; and thence	South 47° 42′ east 50.52 chains to a point on the south side of a ravine; and thence
32.	South 41° 37′ *east* $17\frac{33}{100}$ chains to the place of beginning, containing 1,021¼ acres.	South 41° 37′ west $17\frac{33}{100}$ chains to the place of beginning, containing 1,021¼ acres.

The accompanying map indicates the position of the land in controversy.

The case was argued by *Mr. Montgomery Blair* for the plaintiffs in error.

A sheriff's deed is strictly construed, and no property passes by it which is not described with reasonable certainty. *Mason* v. *White*, 11 Barb. 173; *Rector* v. *Hart*, 7 Mo. 531; *Clemens* v. *Raunells*, 34 id. 579.

Every part of the description in such a deed must be read and satisfied with reasonable certainty, and no part of it can be rejected for its falsity. 19 N. H. 290; 22 Wis. 167; 1 N. H. 93; *Raymond* v. *Longworth*, 14 How. 76; *Dyke* v. *Lewis*, 2 Barb. 344; *Tallman* v. *White*, 2 Comst. 66; *Jackson* v. *DeLancy*, 11 Johns. (N. Y.) 367; *Jackson* v. *Rosevelt*, 13 id. 97.

Hence, a description in which the calls cannot be harmonized, and in which several of the calls for monuments and one for courses must be rejected to enclose the land, has not the certainty required by law.

A sheriff's deed does not, like a deed *inter partes*, admit of the consideration of extraneous circumstances to arrive at its intent. Its intent must be found in its terms; and, if they are contradictory, it is void, unless the circumstances are such as to entitle the grantee to have the deed reformed.

The proceeding to reform it is, in its nature, an equitable one, in which the relief and the grounds upon which it is asked must be stated in the pleadings. In the absence of such a prayer, even if the proof showed a case for equitable relief, it would be error in the court to grant it, either directly by decree reforming the deed, or in effect by rejecting calls found to be false, mistaken, and repugnant.

No case for equitable relief is shown. There is no proof that it was actually made known that the land in question was the land offered for sale, or that it was a fair sale, or that any thing at all was paid for it.

Mr. William Henry Rawle for the defendant in error.

In cases of deeds *inter partes*, erroneous descriptions will be rejected to conform to the true intent of the deed. *Brown* v. *Huger*, 21 How. 306; *Howe* v. *Bass*, 2 Mass. 380; *Penman* v. *Wead*, 6 id. 132; *Caldwell* v. *Holder*, 40 Penn. 168; *Lodge* v. *Barnet*, 46 id. 477; *Warter* v. *Picot*, 33 Mo. 490; *Kellogg* v. *Muller*, id. 571; *Park* v. *Pratt*, 38 Vt. 545.

In the case of conflicting monuments, the rule of law is, that the courses and distances are evidence of the true description; and where it appears from the deed that a monument is erroneously inserted, it will be rejected. *Shipp* v. *Miller*, 2 Wheat. 316; *Barclay* v. *Howell*, 6 Pet. 511; *Atkinson* v. *Cummins*, 9 How. 485; *Noonan* v. *Lee*, 2 Black, 504; *Davis* v. *Rainsford*, 17 Mass. 207; *Thatcher* v. *Howland*, 2 Met. (Mass.) 41; *Park* v. *Loomis*, 6 Gray (Mass.), 472; *Bosworth* v. *Shutsvort*, 2 Cush. (Mass.) 393; *Hamilton* v. *Foster*, 45 Me. 40; *Evans* v. *Greene*, 21 Mo. 481; *Gibson* v. *Bogy*, 28 id. 481; *Bass* v. *Mitchell*, 22 Texas, 285; *Browning* v. *Atkinson*, 37 id. 633; *Bagley* v. *Morrill*, 46 Vt. 99.

It is obvious that when the reason ceases for making monuments control, the rule also ceases; and, *a fortiori*, where, as in this case, all the courses and four subsequent boundaries harmonize, *one* conflicting boundary will be rejected.

The expression of the quantity of land contained in the deed is very material. *Kirkland* v. *Way*, 3 Rich. 4; *Mann* v. *Pearson*, 2 Johns. 37; *Fuller* v. *Caw*, 33 N. J. 157; 1 Greenl. on Ev. p. 437, note. So, also, is the question of ownership. *Dygert* v. *Phelps*, 25 Wend. 404; *Piper* v. *True*, 36 Cal. 619.

In all that relates to the description of the property conveyed, the rules of construction are the same in all deeds, whether *inter partes* or made by officials. *Atkinson* v. *Cummins*, 9 How. 479; *Marshall* v. *Greenfield*, 8 Gill & Johns. 358; *Lodge* v. *Barnett*, 46 Penn. St. 483; *Bartlett* v. *Judd*, 21 N. Y. 200; *Mellow* v. *Hammond*, 17 Mo. 192; *Wing* v. *Burgis*, 13 Me. 111; *Higgins* v. *Ketchum*, 4 Dev. & Bat. (N. C.) L. 414; *Farys* v. *Farys*, 1 Harp. (S. C.) 261; *Reid* v. *Healsey*, 9 Dana (Ky.), 326; *Shewalter* v. *Pisner*, 55 Mo. 219; *Doe* v. *Vallejo*, 29 Cal. 388; *Quivey* v. *Baker*, 37 id. 471; *Dyson* v. *Leek*, 2 Rich. (S. C.) 543; *Bates* v. *Bank*, 15 Mo. 311; *Bank* v. *Bates*, 17 id. 583; *Lisa* v. *Lindell*, 21 id. 128; *Coffee* v. *Silvan*, 15 Texas, 354; *Hackworth* v. *Zollars*, 30 Iowa, 433; *Dygert* v. *Phelps*, 25 Wend. (N. Y.) 402.

MR. JUSTICE DAVIS delivered the opinion of the court.

This is the case of a mortgagor unable to pay his debt, and getting it satisfied by a judicial sale of the mortgaged premises, who, on the ground that no title passed by reason of misdescription in the deed of the sheriff, seeks to prevent his creditor, who purchased them, from recovering possession. And this, too, when, if there be any misdescription, it was presumably caused by him, as they were offered for sale in parcels, by his direction and for his advantage. As the court does not find that the descriptive errors misled any person, or caused any sacrifice of the property, the presumption is, that no one was injured, and that the property brought a full price. Obviously, therefore, there are no merits in this defence. It rests alone on the idea that sheriffs' deeds and ordinary deeds *inter partes* are subject to different rules of construction. In regard, however, to the description of the property conveyed, the rules are the same, whether the deed be made by a party in his own right, or by an officer of the court. The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish. Is this deed void for uncertainty of description, or can the property intended to be conveyed be

reasonably located by means of that description? The court below located it by adopting, except in one instance, the calls for courses and distances, and rejecting as false and repugnant certain calls for known objects. It is true, that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance.

Greenleaf, in his Treatise on Evidence (vol. i. sect. 301), in speaking on this subject, in effect says, That where the description in the deed is true in part, but not true in every particular, so much of it as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application. Applying this rule to the subject-matter of this deed, we do not think there is any difficulty in reaching the conclusion that the description is sufficiently certain to pass the title to the land.

The court below found, among other things, that if the courses and distances, being the field-notes of the survey, are followed from the point of beginning, changing east into west in the last course, the lines would, by closing, embrace the tract of land sued for, and correspond with all the other calls and monuments mentioned in the deed, except that there would be a departure at nearly right angles from the partition fence at the beginning of the call N. 47½° E. 127 chains, and the lines would not extend to, nor in any manner correspond with, the north boundary of the rancho Sal Si Puedes. There are, therefore, three descriptive errors, which, if removed from the deed, would harmonize all other particulars in it, and leave enough words of description to identify the demanded premises.

These errors will be noticed in the order stated by the court. The deed closes with these words: "and thence S. 41° 37′ E. 17.32 chains to the place of beginning." This distance was correct, and so, except in one particular, was the course. It

should have been *west* instead of *east*. To follow the course as given would manifestly not close the lines of the survey; and as, other things being equal, boundaries prevail over courses, the court rejected the latter and adopted the former as the true description in this particular. This was so obviously right, that further comment is unnecessary.

The next error relates to the "fence along the line of partition."

There is a call for this fence as a boundary during the running of seven courses; but it is plainly a false call, after the sixth course has been run, for the seventh course departs at nearly right angles from the line of the fence, and if this course be rejected and the call for the fence retained, none of the other calls in the deed can be complied with, and the instrument is wholly unintelligible. On the contrary, if this course be accepted as the true description, and the call for the fence be discarded at the termination of the sixth course, there is no difficulty of harmonizing the other parts of the deed, with the exception of the northern boundary, and the difficulty there, we think, can be easily removed. It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for the course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant. This applies with equal if not greater force to the last and main error in this deed. Adopting the seventh course as the true description, the calls in the deed proceed as follows: "N. 47½° E. 127 chains to the north boundary of the rancho Sal Si Puedes on the mountains, thence along said north boundary the following courses," &c.

The calls for these boundaries are equally false and mistaken with the call for continuing the line along the partition fence, as is clearly shown in the findings of fact by the court below. There are two ranges of mountains in the direction of the

course N. 47½° E. The summit of the first range is the northerly boundary line between the counties of Santa Cruz and Santa Clara, and both the summit and county line are about the distance of 127 chains from the point in the partition fence where the course N. 47½° E. begins.

There is another range of mountains in the same northerly direction, in the county of Santa Clara, about three-quarters of a mile beyond the summit of the first range, and the northerly boundary of the rancho Sal Si Puedes is on this range of mountains.

The calls for courses and distances run along the summit of the first range, and do not apply to the second. Besides this, if the summit of the first be treated as the boundary intended to be called for, all other calls, monuments, courses, and distances in the deed completely harmonize, except the two descriptive errors which have already been corrected, and the lines enclose a tract of the precise number of acres sued for, lying wholly within the county of Santa Cruz. But if the call for "the north boundary of the rancho" be retained as the true description, there is not only conflict with all the remaining courses and distances, but all the subsequent monuments mentioned in the deed, and the lines would not enclose the land in controversy, nor, indeed, any other. With all these facts to rest upon, is not the conclusion irresistible, that the words of the call at the end of the course N. 47½° E. 127 chains — to wit, "the north boundary of the rancho Sal Si Puedes on the mountains," and "along said boundary the following courses" — were mistakenly inserted, and should be rejected? Rejecting them, with the other particulars we have named, from the deed as false and inconsistent with the other parts of the description which are true, and of themselves sufficient to make a complete instrument, we are able to give effect to this judicial sale, according to the plain and manifest meaning of the officer who had it in charge.

It is rare, where so many field-notes of the survey of an irregularly shaped tract of land are incorporated in a deed, that there are so few mistakes. The courses and distances in this deed are numerous, and are all correct, except the last; and there the only error is in the course, which is easily corrected,

as the call is for the post where the survey begins. And these courses and distances enclose the identical land in dispute. In such a case, it would be wrong to let two false boundaries stand in order to defeat a conveyance.

It is proper to remark that a map will accompany the report of this case, so as to make this opinion intelligible.

Judgment affirmed.

HOME INSURANCE COMPANY *v.* BALTIMORE WAREHOUSE COMPANY.

1. A policy of insurance taken out by warehouse-keepers, against loss or damage by fire on "merchandise, their own or held by them in trust, or in which they have an interest or liability, contained in" a designated warehouse, covers the merchandise itself, and not merely the interest or claim of the warehouse-keepers.
2. If the merchandise be destroyed by fire, the assured may recover its entire value, not exceeding the sum insured, holding the remainder of the amount recovered, after satisfying their own loss, as trustees for the owners.
3. Goods described in a policy as "merchandise held in trust" by warehousemen, are goods intrusted to them for keeping. The phrase, "held in trust," is to be understood in its mercantile sense.
4. A policy was taken out by warehousemen on "merchandise" contained in their warehouses, "their own or held by them in trust, or in which they have an interest or liability." Depositors of the merchandise, who received advances thereon from the warehousemen, took out other policies covering the same goods. *Held*, that the several policies constituted double insurance, and that they bear a loss proportionally.
5. In a case of contributing policies, adjustments of loss made by an expert may be submitted to the jury, not as evidence of the facts stated therein, or as obligatory, but for the purpose of assisting the jury in calculating the amount of liability of the insurer upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct.
6. What evidence may be submitted to a jury from which they may find a waiver of preliminary proofs.
7. No part of a letter written as an offer of compromise is admissible in evidence.

ERROR to the Circuit Court of the United States for the District of Maryland.

This was assumpsit by the defendant in error, commenced June 2, 1873, on a policy of insurance issued to it Dec. 7, 1869, by the plaintiff in error, and containing, among others, the following provisions: —

"By this policy of insurance the Home Insurance Company, in consideration of $100 to them paid by the insured hereinafter

named, the receipt whereof is hereby acknowledged, do insure Baltimore Warehouse Company against loss or damage by fire to the amount of $20,000, on merchandise hazardous or extra hazardous, their own or held by them in trust, or in which they have an interest or liability, contained in that part of the State tobacco-warehouse No. 2, used by them, lying between Frederick-Street Dock and Long Dock, separated by a street from the south end of the Maryland Sugar Refinery. Other insurance permitted without notice, unless required.

"To cover whilst on the street and pavement around said warehouse. As per application.

"And the Home Insurance Company above named, for the consideration aforesaid, do hereby promise and agree to make good unto the said assured, their executors, administrators, or assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified during one year, — to wit, from the seventh day of December, 1869 (at twelve o'clock at noon), until the seventh day of December, 1870 (at twelve o'clock at noon), — the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen; and to be paid within sixty days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to this policy, unless the property be replaced by similar property of equal value and goodness, or the company have given notice of their intention to rebuild or repair the damaged premises."

Also the following conditions: —

"9. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, or its agent, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also the ownership of the property insured; what other insurance, if any, existed on the same property, and giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such build-

ing; and when and how the fire originated, so far as they know or believe."

"18. It is furthermore hereby expressly provided, that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

By an act of the general assembly of Maryland, passed at the January session, 1867, the defendant in error was chartered for the purpose of carrying on the business of warehousemen and forwarders in the city of Baltimore. It was "expressly prohibited from buying or selling any goods, wares, or merchandise, or other property, as dealers or on commission," but was authorized to receive and collect the usual and customary rates of dockage, wharfage, storage, and lighterage on all goods deposited with it, which, together with all charges and expenses incurred for labor or otherwise in the receipt, delivery, or custody of such goods, was made a lien thereon.

The tenth section of the charter was as follows: —

"The receipts, warrants, or warehouse certificates issued by this corporation for goods, wares, and merchandise in their possession or under their control, shall, in all cases, be signed by the president or vice-president and secretary of the corporation, and attested by the corporate seal; and copies thereof shall be registered in two books kept for that purpose, one of which books shall be kept by each of the officers whose signatures are to be affixed as aforesaid, which books shall be at all times open for the inspection of dealers with said corporation. The said receipts, warrants, or certificates may be transferred by indorsement thereof; and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons; but no property shall be delivered except on surrender and cancellation of said original receipt, warrant, or certificate. Every such receipt, warrant, or ware-

house certificate shall contain on its face a notice that the property mentioned therein is held by this corporation as bailees only, and is not insured by this corporation."

The charter was, in 1870, amended so as to authorize the corporation "to make advances upon all goods, wares, merchandise, or other property which may be received by or stored with it."

It was admitted at the trial, that, on the 18th of July, 1870, State tobacco warehouse No. 2 was destroyed by fire; that, at the time of the fire, property was stored by the following persons, in accordance with receipts given by the defendant in error to them respectively, of which the subjoined is a specimen: —

Notice.

The property mentioned in this receipt is held by this corporation as bailees only, and is not insured by this corporation.

BALTIMORE WAREHOUSE COMPANY.

Incorporated 1867.

No. 1168.] BALTIMORE, May 24, 1870.

Marks.
× Q.

EXPENSES.
Storage 25c. per mo.
Labor . . .
Cooperage . .
Ganging. . .
Weighing . .
Elevator. . .
Commission .
Advances . .

Received by the Baltimore Warehouse Company, in store at No. 2 tobacco warehouse, from Hough, Clendening, & Co., one hundred and nine bales cotton, to be delivered according to the indorsement hereon, but only on the surrender and cancellation of this receipt, and on the payment of the charges payable thereon.

{ BALT'O. WAREHOUSE CO. SEAL. }

JAMES HOOPER, *President.*
JAMES B. EDWARDS, *Secretary and Registrar.*

1168.

Copy.] BALTIMORE, 18 .

Deliver to the order of the within-described merchandise.

(Signed) HOUGH, CLENDENING, & Co.

Witness:

Hough, Clendening, & Co.,	cotton	$52,863.00
Hawkins, Williamson, & Co.,	„	26,861.16
Elliott Bros.,	„	8,188.81
McCloud & Co.,	„	1,862.35
F. L. Brauns & Co.,	„	2,888.00
W. B. Hooper,	„	320.97
F. W. Beck & Co.,	tobacco	6,000.00
Total		$98,984.29

That all of said property was destroyed by fire on the 18th of July, 1870, except that embraced in a salvage statement made by a committee appointed by the underwriters, and signed by George B. Coale for the committee.

Previously to and at the time of said fire, the defendant in error held a policy, substantially in the same form as that now in suit, issued by the Associated Firemen's Insurance Company of Baltimore, in the sum of $10,000. The following policies in the names of other parties as assured, covering only specific portions of said property hereinafter mentioned, were in force, viz.: —

On the property stored by Elliott Bros., three policies of the following companies, viz., in name of Elliott Bros.: —

W. H., Potomac Ins. Co. for	$14,000
W. H., Peabody " "	3,500
W. H., Royal " "	3,400
	$20,900

On the property stored by F. W. Beck & Co. policies in their name as assured in —

W. H., The People's Ins. Co. for	$6,000

On that of Hough, Clendening, & Co. in their name as assured: —

W. H., The Hartford Ins. Co. for	$3,500
W. H., " Franklin " "	3,500
W. H., " People's " "	2,500
W. H., " Potomac " "	900
W. H., " Peabody " "	6,000
W. H., " City " "	7,700
W. H., " Washington " "	7,300
W. H., " Atlantic (1 $3,500 and 1 for $6,000)=	9,500
W. H., " Consolidated Ins. Co. for	12,100
W. H., " Home Ins. Co. of Baltimore for . .	6,000
W. H., " Citizens' " " " " . .	1,400

Said last-mentioned policies covered 676 bales of cotton, if the two $6,000 policies of the Peabody and Atlantic were each on 110 separate bales, and 566 bales, if they both were only the same 110 bales, and that said cotton was worth at the time of the fire $78.32 per bale.

On the property stored by Hawkins, Williamson, & Co. in their name as assured: —

Royal Ins. Co. for	$10,000
Western „ „	6,500
W. H., Connecticut Ins. Co. for	16,000
W. H., Peabody „ „	5,000
W. H., Hartford „ „	3,000
W. H., Home Ins. Co. of Baltimore for	5,000

On the property stored by F. L. Brauns & Co. in their name as assured: —

People's Ins. Co. for	$2,888

It was also admitted that the defendant in error had advanced to the owners of said property, on the deposit thereof, the sums hereinafter named, and that it held the said property as security therefor, viz.: —

To Hough, Clendening, & Co.	$48,720
„ Hawkins, Williamson, & Co.	16,800
„ McCloud & Co.	1,480
„ F. W. Beck & Co.	4,234
	$71,234

It was further admitted, that all of the before-mentioned policies marked "W. H." were made payable on their face to the defendant in error, in these words: "Loss, if any, payable to the Baltimore Warehouse Company," and delivered to and held by it as additional security for advances at the time of the making of said advances.

Among other points on which no agreement between the underwriters and the insured could be reached, was the question whether the general policy of the plaintiff in error and that of the Associated Firemen's Insurance Company were liable to contribute with the specific policies for losses on the property covered by the latter.

Cases involving this question were instituted in the State courts. Among others, was one by Hough, Clendening, & Co., to the use of the warehouse company, on a specific policy against the People's Insurance Company.

For the purpose of awaiting the decision by the State courts of this question of contribution, and also of the question whether the policies of the Peabody and Atlantic companies covered the same lot of one hundred and ten bales of cotton, or two lots each of that number, amounting together to two hundred

and twenty bales, the plaintiff entered into a written agreement with the defendant, extending, to a named day, the period within which suit might be brought on the policy sued on in this case. The final decision of these questions not having been made within the period prescribed in the first agreement, another agreement was made, providing for a further extension. Pending this state of facts, the defendant in error presented to the plaintiff in error preliminary proof as to, and received payment for, twenty-four bales of cotton, which were not covered by any of the specific policies, nor affected by any of the questions involved in the cases pending in the State court, nor otherwise the subject of dispute. When this payment was made, the plaintiff in error asked to have its policy surrendered. Hooper, the president of the defendant in error, refused to surrender it, saying that he wanted to retain it to cover all losses, whether then seen or not, — all against which it might turn out, from the decision of the cases then pending, or from other causes which could not then be anticipated or seen, that the defendant in error was not otherwise protected; adding that some of the companies which had issued specific policies were already contending that the policies issued by the plaintiff in error and the Associated Company were bound to contribute to the losses covered by the specific policies. He also then made claim for the one hundred and ten bales of cotton, if not covered by the policies of the Peabody and Atlantic, on the ground that the policy in suit was intended to cover all losses of every kind which could not be seen or specified. Coale, the agent of the plaintiff in error, denied that it could be held responsible for any other loss than that of the twenty-four bales. No final settlement was made. But, after consulting with the home officers of his company, he settled for the twenty-four bales, allowed Hooper to retain its policy, and took a receipt for the special settlement then made. No objection to the want of preliminary proof as to the claims retained was made, until a few days before the institution of this suit. The plaintiff in error denied its liability on these claims, until the decision of the State court in one of the cases pending in it; after which Coale, its agent, admitted that its liability was thereby established, and made various calculations of the amount thereof.

Barney, who was elected president of the defendant in error after the fire, and after the settlement between Hooper and Coale, became convinced that the policies of the Peabody and Atlantic companies covered only the same lot of one hundred and ten bales, and settled with these companies on that basis. It was not sought at the trial to bind the plaintiff below by that settlement; but the question, whether one hundred and ten bales were uncovered by specific policies or not, was left as an open one to the jury for their decision.

At the trial, the above-mentioned facts having been all proved, and the defendant in error having proved that Frank P. Clark was a lawyer by profession; that he had occupied himself in making insurance adjustments, as a specialty; and that, in 1870, he had devoted himself principally to that business, — offered as part of his evidence several statements or adjustments made by him as illustrations of the results arrived at upon the different theories of adjustment therein adopted. The plaintiff in error objected to their admission in evidence; but the court overruled the objection, and allowed them to go to the jury, only for the purpose of assisting them in calculating the amount of liability of the plaintiff, upon the several hypotheses of facts stated in said calculations, with the express instruction, that they were admitted only as calculations to aid the jury, and were in no way binding on them. To this ruling the plaintiff in error excepted.

The plaintiff in error afterwards offered in evidence a letter, which was admitted to be part of a negotiation for a compromise; offering to read only a portion of it, if the whole was objected to. The defendant in error objected to the reading of any part of it. The objection was sustained, and the plaintiff in error excepted.

The plaintiff below thereupon submitted several prayers to the court for instruction to the jury, which said prayers were refused, except the fifth, which was as follows: —

5th, If the jury shall find, from the evidence, that Hooper, the president of the plaintiff, at the time of receiving from the defendant the moneys receipted for on the said policy for the losses mentioned therein, was requested by Coale, the defendant's agent, to surrender the said policy, but refused to

do so, and notified Coale that he retained the said policy in order to assert, against the defendant thereafter, any claims thereunder not then known to him, but which might thereafter appear; and that said Coale accordingly left said policy in the hands of Hooper, and wrote and signed the receipt written thereupon, and altered the usual receipt of the company to conform thereto in the manner testified to by said Coale, and sent to the defendant a copy of said receipt as altered, with the memorandum thereon proven by said Coale;

And if the jury shall further find, that said Coale did not, nor did the defendant, make any objection to the retention of said policy by said Hooper, for the purpose aforesaid, but, on the contrary, assented thereto, and that said Coale simply denied and protested that the defendant was not liable, and would not and did not recognize or concede its liability under the terms of said policy for any other losses than those paid and receipted for as aforesaid;

And shall further find, that the agreements for the waiver of the thirteenth condition of said policy, which have been given in evidence, were executed by the defendant, for the purpose of giving to the plaintiff a continuing right to assert by suit its claims reserved by Hooper, as aforesaid, pending litigation in the State courts, involving the legal principles on which the respective rights of the parties under said policy might depend; and that no suggestion or intimation of any defence to said claims on the ground of defect or failure of preliminary proof or notice under the ninth condition of insurance, was made by defendant or its said agent, until a short time before the institution of this suit, and after ineffectual efforts between the parties to settle the claims of the plaintiff under said policy upon their merits, then —

The jury are entitled, from such facts, with the other facts in the case, to find that the defendant waived the compliance by the plaintiff as to such reserved claims, with the fifteenth paragraph of the ninth of the conditions of insurance attached to the policy.

And if the jury find such waiver as aforesaid, then the failure to offer such preliminary proof is no bar to the plaintiff's right to recover in this suit.

The defendant below, at the same time, presented the following seven prayers, and prayed the court to give to the jury the several instructions therein asked for: —

1. The policies obtained by Hough, Clendening, & Co. upon their cotton, and made payable to the Baltimore Warehouse Company, being for a different assured, were upon a different interest from that covered by the policy now in suit; and the latter is not bound to contribute to any losses for which the former are liable.

2. If the jury find, that, in the course of dealing between the Baltimore Warehouse Company and its depositors, the latter, before receiving advances upon goods stored, were required to insure the same to an amount not less than the sum advanced, and that for the purpose of securing the said warehouse company the policies in such cases were made payable to the warehouse company, and were delivered to them at the time of procuring such advances; and shall further find, that the two policies of $6,000 each, issued on the twenty-fourth day of May, 1870, by the Atlantic and Peabody Insurance Companies, were obtained by Hough, Clendening, & Co., with knowledge on the part of said companies that they were intended to secure the warehouse company for advances, and that Hough, Clendening, & Co. then took them to the said warehouse company, and that the latter received them without notice to the said warehouse company of the circumstances under which they were obtained; and that, upon the faith thereof, the said warehouse company, their officers believing that each policy insured the full quantity mentioned in the same, and that the two together covered two hundred and twenty bales, thereupon advanced to Hough, Clendening, & Co. a sum of money larger than would have been advanced but for the existence of both said policies, and the belief that they were independent of one another, — then the said Atlantic and Peabody companies were respectively bound as between them and the said warehouse company by the representations contained in the respective policies, and could not limit their responsibility to a joint responsibility for one hundred and ten bales of cotton; but were each liable, as separate insurers, to the amount of one hundred and ten bales.

8. If the jury shall find from the evidence, that, from the time of the fire of July 18, 1870, until after the 25th of June, 1872, no claim or demand was made by the plaintiff on the defendant for any loss by reason of said fire, except for the twenty-four bales of cotton mentioned in the written proofs and settlement offered in evidence, and for an alleged liability of the defendant, under the policy declared on, for contribution with the special policies set forth in the agreement filed in this case, — then there is no evidence before the jury from which they can infer a waiver of preliminary proof, on the part of the defendant, in regard to any other claim under the policy declared on, except the claim for contribution with the said special policies.

4. By the ninth condition of the policy upon which this suit is brought, it was made necessary for the insured, after the fire, forthwith to give notice of their loss to the defendant, and as soon as possible thereafter to deliver as particular an account of their loss and damage as the nature of the case admitted of, and to accompany the same with proof as therein provided; and no acts or declarations of the agent, Coale, subsequent to the 10th of October, 1870, are admissible to show waiver by the defendant of said condition.

5. In determining the question, whether there has been a waiver of preliminary proof, the jury cannot consider declarations of the defendant's agent, Coale, made to parties other than the officers or agents of defendant, denying the defendant's liability to the plaintiff for any loss whatever beyond that of the twenty-four bales of cotton which were included in the settlement offered in evidence.

6. There is no evidence in this case of any waiver, on the part of the defendant or of its agent, in such manner as to bind them, of notice of loss and preliminary proof as to the one hundred and ten bales of cotton alleged to have been left without specified insurance by reason of the Atlantic and Peabody policies of $6,000 being upon the same one hundred and ten bales.

7. That, if the jury shall find from the evidence and under the instructions of the court that, at the time of the fire of July 18, 1870, there were one hundred and ten bales of cotton

deposited by Hough, Clendening, & Co. in the warehouse of the plaintiff, which were not covered by any of the special policies taken out by said Hough, Clendening, & Co., and made payable to plaintiff, and that the plaintiff had notified the said Hough, Clendening, & Co. that they themselves must insure all cotton deposited by them; and if the jury shall find that there was, on the part of the defendant, a waiver of preliminary proof in regard to the loss on said one hundred and ten bales, and that the plaintiff is entitled to recover on account of said loss, — then the amount the said plaintiff is entitled to recover on account of said one hundred and ten bales should be two-thirds of plaintiff's own loss by reason of the damage of said bales by said fire; and, in order to ascertain the plaintiff's own loss on said one hundred and ten bales, the salvage thereon received by the plaintiff, and the amount due on all the said special policies, should be deducted from the total amount advanced by the plaintiff to the said Hough, Clendening, & Co.

The court rejected all of said prayers of the defendant, excepting the fifth, and instructed the jury as follows: —

If the jury shall find, from the evidence in this case, that, at the time of the fire of July 18, 1870, there were one hundred and ten bales of cotton in the warehouse of plaintiff, deposited by Hough, Clendening, & Co., which were not covered by any of the special policies taken out by said depositors; and that on said one hundred and ten bales the plaintiff had made advances, which were unpaid at the time of the fire; and shall further find for the plaintiff as to the waiver of preliminary proof, under the fifth prayer of the plaintiff, which is granted by the court, — then the plaintiff is entitled to recover in this action for the two-thirds of all loss or damage to said one hundred and ten bales, to the extent of its advances as aforesaid.

And if the jury shall find, from the evidence, that there was other cotton deposited by depositors in plaintiff's warehouse, and which was covered by special policies of insurance given in evidence in this case, and upon which plaintiff had made advances, — then the said plaintiff is entitled to recover also for the two-thirds of all loss or damage to said cotton, to the extent of its advances on the same, less the amount which the jury may find to be due from said special policies made payable to

the said plaintiff, each of said special policies contributing to the loss on the cotton insured by it with the general policies held by the plaintiff.

The defendant thereupon excepted to the rejection by the court of its first, second, third, fourth, sixth, and seventh prayers, and to the granting of the fifth prayer of the plaintiff, and to the instruction given to the jury in accordance therewith, and also to the court's instructions, and severally to each proposition in said instruction contained.

The jury found a verdict for the plaintiff below for $16,585.73, and judgment was rendered thereon; whereupon the defendant below brought the case here, and assigns for error, —

1st, The admission of the statements or adjustments of the witness Clark.

2d, The refusal to admit the letter from Barney to Coale.

3d, The admission of the record of the suit of *Hough, Clendening, & Co.* v. *People's Ins. Co.*

4th, The granting of plaintiff's fifth prayer.

5th, 6th, 7th, 8th, 9th, 10th, The rejection of the defendant's second, third, fourth, sixth, and seventh prayers.

11th and 12th, The first and second paragraph of the charge to the jury, as given.

Mr. A. W. Machen and *Mr. Thomas Donaldson* for the plaintiff in error.

The plaintiff in error is not bound to contribute to the payment of losses for which the policies of Hough, Clendening, & Co. are liable. They were for a different assured, and upon a different interest. There was, therefore, no double insurance. The memorandum upon their face, the "loss, if any, payable to the Baltimore Warehouse Company," does not affect the principle; but is simply "a mode of appointing that the loss of the party assured shall be paid by the company to such third person." *Bates* v. *Equitable Ins. Co.*, 10 Wall. 33; *Grovesnor* v. *Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Hale* v. *Mech. Mut. Fire Ins. Co.*, 6 Gray, 172; *Fogg* v. *Middlesex Manuf. Co.*, 10 Cush. 346; *Macomber* v. *Cambridge Mut. Ins. Co.*, 8 id. 135; *Young* v. *Eagle Fire Ins. Co.*, 14 Gray, 153; *State Mut. Fire Ins. Co.* v. *Roberts*, 31 Penn. 438; *Loring* v. *Manuf. Ins. Co.*, 8 Gray, 28; *Woodbury Savings Bank* v. *Charter Oak Ins. Co.*,

29 Conn. 374; *Turner* v. *Quincy Mut. Fire Ins. Co.*, 109 Mass. 568; *Tallman* v. *Atlantic F. & M. Ins. Co.*, 29 How. Pr. 71.

The decision of the Court of Appeals of Maryland in *Hough, Clendening, & Co.* v. *People's Ins. Co.*, 36 Md. 398, cannot bind the plaintiff in error, which was in no sense a party to that case, nor can it affect the decision of this court in the present suit. 1 Greenl. Ev., sect. 523; *Carpenter* v. *Prov. & Wash. Ins. Co.*, 16 Pet. 495, 511.

The circumstance that that court, long after this contract was entered into and the occurrence of the loss, put an erroneous construction on another contract between other parties, cannot alter the meaning of this. *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; *North Brit. Ins. Co.* v. *Moffatt*, L. R. 7 C. P. 25; *Lee* v. *Adsit*, 37 N. Y. 78.

The respective policies of the Atlantic and Peabody Insurance Companies each appearing to be on one hundred and ten bales of cotton, without indicating any identity of subject-matter, and there being in the warehouse two distinct lots to which they were respectively applicable, and having been accepted and acted upon by the warehouse company as covering distinct lots, on both of which it made advances, the former companies knowing that the policies were made to cover advances, — it was not competent for them to contradict the representations contained in their respective policies. Each of said companies was liable, as a separate insurer, to the amount of one hundred and ten bales.

No suggestion of a claim for a loss on one hundred and ten bales, as uninsured by any particular policy of any depositor, having been made until after the lapse of some two years from the time of the loss, there was no evidence from which the jury could infer any waiver of preliminary proof in regard to said one hundred and ten bales.

The declarations of the agent, made after the lapse of the period within which preliminary proof should have been made, could not have the effect of a waiver of such proof as against the company. 1 Tayl. Ev., sects. 539, 540.

The plaintiff's fifth prayer, which was granted, is liable to special objection, because the facts selected, if found by the jury, did not authorize a finding of a waiver of preliminary

proof, — certainly not as to all the claims of loss now made, and not as we suppose to any of them; and because it was improper to leave to the jury the construction of the written agreements referred to, and the determination of their effect.

The statements of calculations and adjustments made by the witness Clark, and offered in evidence, were not proper evidence to go to the jury; being both irrelevant and calculated to mislead it.

The part of Barney's letter offered in evidence was competent, and should have been admitted. A statement accompanying an offer of compromise, even if intended as an inducement to a compromise, is admissible. *Seldner* v. *Smith*, 40 Md. 602.

Mr. John H. Thomas, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The most important question in this case relates to the proper construction of the defendants' policy of insurance. It is contended on their behalf that it covered only the warehouse company's interest in the goods contained in the warehouse. If this is the true meaning of the contract, the instruction given by the Circuit Court to the jury was erroneous. If, on the other hand, the policy covered the merchandise itself, and not merely the interest which the warehouse company had therein, there is no just ground of complaint of the charge of the circuit judge. Blanket and floating policies are sometimes issued to factors or to warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge. In those cases, as in all others, the subject of the insurance, its nature and its extent, are to be ascertained from the words of the contract which the parties have made. It is as true of policies of insurance as it is of other contracts, that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies alone. There are cases in which resort may be had to parol evidence to ascertain the subject insured; but they are cases of latent ambiguity. So, in the construction of other contracts, parol evidence is admissible to explain such ambiguities. In this particular, the rule for the construction of all written con-

tracts is the same. Lord Mansfield said long ago that courts are always reluctant to go out of a policy for evidence respecting its meaning. *Loraine* v. *Tomlinson*, Doug. 564. And so are the authorities generally. *Astor* v. *Union Ins. Co.*, 7 Cow. 202; *Murray* v. *Hatch*, 6 Mass. 465; *Levy* v. *Merrill*, 4 Greenl. 480; *Baltimore Fire Ins. Co.* v. *Loney*, 20 Md. 36; Arnould on Ins. 1316, 1317, and notes; 2 Greenl. on Ev. 377. It is no exception to the rule, that, when a policy is taken out expressly "for or on account of the owner" of the subject insured, or "on account of whomsoever it may concern," evidence beyond the policy is received to show who are the owners or who were intended to be insured thereby. In such cases, the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all. *Finney* v. *Bedford Ins. Co.*, 8 Met. 348.

Turning, then, to the policy issued to the plaintiff below, and construing it by the language used, the intention of the parties is plainly exhibited. Its words are, The Home Insurance Company "insure Baltimore Warehouse Company against loss or damage by fire, to the amount of $20,000, on merchandise hazardous or extra-hazardous, their own or held by them in trust, or in which they have an interest or liability, contained in" a certain described warehouse. There is nothing ambiguous in this description of the subject insured. It is as broad as possible. The subject was merchandise stored or contained in a warehouse. It was not merely an interest in that merchandise. The merchandise of the warehouse company, owned by them, was covered, if any they had. So was any merchandise in the warehouse in which they had an interest or liability. And so was any merchandise which they held in trust. The description of the subject must be entirely changed before it can be held to mean what the insurers now contend it means. If, as they claim, only the interest which the warehouse company had in the merchandise deposited in their warehouse was intended to be insured, why was that interest described as the merchandise itself? Why not as the assured's interest in it? Throughout the policy, wherever the subject intended to be insured is spoken of, it is described, not as a partial interest, not as a

mere lien for advances and charges upon the goods held in storage, but as the property itself, whatever might be the existing rights to it. Thus the insurance company covenanted to make good to the assured all such loss or damage, not exceeding the sum insured, as should happen by fire "to the property as above specified." What that specification was, we have seen. The policy also contained a provision that, in case of fire, the "property" destroyed might be replaced by similar "property" of equal value and goodness. There are other like designations. Nowhere is any less interest in the goods insured alluded to than the entire ownership. The words of the policy are not satisfied if their import be restrained, as the plaintiff in error seeks to confine it. The parties to whom the policy was issued were warehouse-keepers, receiving from various persons cotton and other merchandise on deposit. They were empowered by their charter to receive bailments and to make charges against the bailors for handling, labor, and custody. They were also authorized to make advances upon the goods deposited with them, and their charges, expenses, advances, and commissions were made liens upon the property. They had, therefore, an interest in the merchandise deposited with them, which they might have caused to be specifically insured. It was also at their option to obtain insurance upon the entire interest in the merchandise, whether held by them or by the depositors. Nothing in their charter forbids such insurance. It is undoubtedly the law that wharfingers, warehousemen, and commission-merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners. *Waters* v. *Monarch Assur. Co.*, 5 Ell. & Bl. 870; *London and North-western Railway Co.* v. *Glyn*, 1 Ell. & Ell. Q. B. 652; *DeForest* v. *Fulton Ins. Co.*, 1 Hall, 136; *Siter* v. *Moritz*, 13 Penn. St. 219. Such insurance is not unusual, even when not ordered by the owners of goods, and when so made it inures to their benefit. And such insurance, we must hold, the warehouse company sought and obtained by the policy of the plaintiff in error. The words "merchandise held in trust" aptly describe the property of the depositors. The warehouse company held mer-

chandise in trust for their customers, not, it is true, as technical trustees, but as trustees in the sense that the goods had been entrusted to them. They were not empowered by their charter to hold property under technical trusts cognizable only in equity. Hence, when they sought insurance of merchandise held by them in trust, it must have been intended of such as they held in trust, — in a mercantile sense, goods entrusted to them by the legal owners. That such is the meaning of the words as used in this policy we cannot doubt. And such has been held by courts of the highest authority to be the meaning of similar words in fire policies. In *Waters* v. *Monarch Fire and Life Assurance Company*, above cited, the policy was issued to persons described as corn and flour factors, who were, in fact, flour-merchants, warehousemen, and wharfingers. It was on goods in their warehouses, and on goods in trust or on commission therein. The assured had in their warehouses goods belonging to their customers, deposited with them as warehouse-keepers, and on which they had a lien for charges for cartage and warehouse rent, but no further interest of their own. They made no charge to the customer for insurance, nor was the customer informed of the existence of the policy. It was ruled that the goods were held in trust, within the meaning of the policy; and, there having been a destruction by fire, that the assured were entitled to recover their entire value, applying so much as necessary to cover their own interest, and holding the remainder as trustees for the owners. Lord Chief Justice Campbell said, "It was not intended to limit the policy to the personal interest of the plaintiff, for in this and all other floating policies the promise is to make good the damage to the goods." A similar ruling was made in the *London and North-western Railway Co.* v. *Glyn*, *supra*. There the plaintiffs, who were common carriers, had obtained insurance of goods against fire, in a company of which the defendant was treasurer. The policy declared £15,000 to be insured "on goods their (the plaintiffs') own and in trust as carriers" in a certain warehouse, and it was stipulated that the company were to be liable to make good to the "assured" all loss which they, "the assured," should suffer on the property therein particularized. In an action on the policy, it was held, that, to the extent of

£15,000, the whole value of the goods in the warehouse in the plaintiffs' possession was insured by it, and not merely their interest in the goods; and that the plaintiffs would be regarded as trustees for the owners of the amount thus recovered, after deducting their charges as carriers.

In opposition to this construction of the policy now before us, our attention has been called by the plaintiffs in error to a provision in the charter of the warehouse company, and to the notice accompanying the receipts they gave for the merchandise delivered to them in storage. The tenth section of their charter, after requiring that the receipts, warrants, or warehouse certificates issued by the corporation for goods, wares, and merchandise in their possession, should be signed by the president or vice-president and secretary, and attested by the corporate seal, after requiring that copies should be registered, and declaring that they should be transferable by indorsement, enacted that every such receipt, warrant, or warehouse certificate should contain on its face a notice that the property mentioned therein was held by the corporation as bailees only, and was not insured by the corporation. Accordingly, all the warehouse receipts did contain such notices. But we are unable to perceive how these facts can have any bearing on the proper construction of the policy. The company was not prohibited by its charter from obtaining insurance to their full value of the goods left with them in bailment. At most, the requirement of the charter was that they should not themselves become insurers. And the notice required to be given to the bailors meant no more than that neither the receiving of the goods nor the certificate of receipt amounted to a contract of insurance. It would be straining the language of the notice most unwarrantably, were we to treat it as amounting to an engagement that the company would not obtain insurance of the property from some corporation authorized to insure.

Without pursuing this discussion further, we have said enough to vindicate our opinion that the policy upon which this suit was brought covered the merchandise held by the warehouse company on storage, and not merely the interest of the bailees in that property. It follows, necessarily, that there was double insurance. The policy issued to the warehouse company, and

those obtained by the depositors of the merchandise, covered the same property, and they were for the benefit of the same owners. The persons assured were the same; for if the policies taken out by Hough, Clendening, & Co. were upon their goods, notwithstanding the memorandum that the loss, if any, was payable to the Baltimore Warehouse Company, as may be conceded was the case, so was the policy now in suit. The insurers are liable, therefore, *pro rata*, each contributing proportionately. It follows that the plaintiffs in error have no reason to complain of the refusal of the court below to affirm their first and seventh points, and none to complain of the instructions given to the jury respecting the extent to which the plaintiffs were entitled to recover, if they could recover at all.

The next question presented by the record, which we propose to consider, is raised by the fourth, the seventh, eighth, and the ninth assignments of error. Those assignments complain of the affirmance of the plaintiffs' fifth point, and of the disaffirmance of the defendants' third, fourth, and sixth. Beyond doubt it was a question for the jury whether furnishing preliminary proof of loss was waived by the defendants or by their authorized agent, if there was any evidence of waiver to be submitted to them. And we think there was such evidence. The defendants were an insurance company of the State of New York. By the act of the Maryland legislature, which empowered them to do business in Maryland, the agent of the company was required to have authority "from the parent office or offices to settle losses, without the interference of the officer or officers of the said parent office or offices." Mr. Coale was their agent, and clothed with such authority. He could, therefore, waive the presentation of preliminary proofs, and his waiver was binding on his principals. *Franklin Fire Ins. Co.* v. *Chicago Ice Co.*, 36 Md. 102. A waiver may be proved indirectly by circumstances as well as by direct testimony. If, after the time for presenting preliminary proofs had gone by, Mr. Coale acted and spoke as if they had been presented in season; if, while resisting the claim upon his company, he placed his objections entirely upon other grounds, and never alluded to any failure of the plaintiffs to exhibit preliminary proofs until those other grounds were apparently swept away; if, after making a payment

for a loss of twenty-four bales of cotton, and after he was notified that the policy would be retained in order to assert afterwards other claims upon it, he expressly waived another one of its conditions, for the purpose of giving to the plaintiffs a continuing right to bring a suit, — the jury might well have inferred that the condition of giving notice of the loss and making preliminary proof had been waived. Such conduct on his part was consistent with a conclusion that such a waiver had been made. It is difficult to account for it, if there had been none. Yet all this evidence, and more, was before the jury. These assignments of error, therefore, cannot be sustained.

The sixth assignment of error requires but a single remark. We do not see that the evidence warranted the hypothesis upon which the defendants' second prayer was based; but if it did, it would be impertinent to the case. If the plaintiffs were mistaken in regard to their rights as against other insurers, such a mistake cannot affect their claim on the defendants' policy.

The tenth assignment has already been shown to be unfounded, by what we have heretofore said.

It remains only to notice some rulings of the Circuit Court in respect to offers of evidence. The court admitted in evidence, notwithstanding objection by the defendants, several statements or plans of adjustment of the loss, made by an expert, and founded upon different theories of the law. They were not admitted as evidence of the facts stated in them, or as obligatory upon the jury, but only for the purpose of assisting the jury in calculating the amount of liability of the defendants upon the several hypotheses of fact stated in them, and stated only hypothetically. It is impossible that the defendants could have been injured by their reception, and without some such assistance no intelligent verdict could have been rendered. The jury was left free to accept either hypothesis, or reject them all. We think there was no error in admitting the calculations.

Nor was there error in receiving the record of the suit of *Hough, Clendening, & Co.* v. *People's Ins. Co.*, in the Maryland courts, under the circumstances of the case. The present parties had agreed to extend the time within which this suit might be brought until the decision of the questions involved in the suit of Hough, Clendening, & Co. The record of that

suit, therefore, was evidence to show its termination. But if not, it was merely irrelevant, and it is not shown that it tended in the least to mislead the jury. A judgment is not to be reversed because evidence was admitted at the trial which could have had no bearing upon the issue, unless it appears that it was misleading in its tendency.

The only remaining assignment of error is that the Circuit Court would not receive in evidence any part of a letter written by the president of the warehouse company to Mr. Coale, the defendants' agent. The letter was an offer of compromise, and as such, upon well-recognized principles, it was inadmissible. And it contains no statement which can be separated from the offer and convey the idea which was in the writer's mind. The court was clearly right in rejecting it.

Judgment affirmed.

STANTON ET AL. v. EMBREY, ADMINISTRATOR.

1. Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer.
2. The pendency of a prior suit in a State court is not a bar to a suit in a circuit court of the United States, or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action.
3. Writs of error from this court to the Supreme Court of the District of Columbia are governed by the same rules and regulations as are those to the circuit courts. When, therefore, the record shows that an exception was taken and reserved at the trial, it is not necessary that the bill of exceptions be drawn out in form, and signed or sealed by the judge, before the jury retires; but it may be so signed or sealed at a later period; and, when filed *nunc pro tunc*, brings the case within the settled practice of courts of error.
4. An agreement to pay a contingent compensation for professional services of a legitimate character, in prosecuting a claim against the United States pending in one of the executive departments, is not in violation of law or public policy.
5. Where the amount of compensation to be paid was not fixed, evidence of what is ordinarily charged by attorneys-at-law in cases of the same character is admissible.

ERROR to the Supreme Court of the District of Columbia.

On the 13th of January, 1872, the plaintiff below, administrator of Robert J. Atkinson, filed his declaration, claiming from the defendants $10,000 with interest, from May 1, 1871, for services alleged to have been performed by the deceased in

prosecuting a claim in their behalf against the United States, before the third auditor of the treasury, from 1865 to Feb. 8, 1870, and subsequently by himself, as administrator, before the secretary and other officials of the Treasury Department.

The defendants pleaded in abatement the pendency of a suit against them, by the same plaintiff and for the same cause of action, in the Superior Court of the county of New London, in the State of Connecticut; to which plea the plaintiff demurred. The court sustained the demurrer, and granted the defendants leave to plead over; whereupon they pleaded the general issue.

The defendants were the owners of certain steamers, which were used by the United States during the war of the rebellion at New Orleans, La., and for which use they had a claim for compensation to the amount of $45,925.07. Atkinson prosecuted it until it was allowed by the accounting officers, and a settlement made. He died before the warrant for the money was issued to the defendants. His services were rendered upon a contract for a contingent remuneration, the amount of which was not fixed. Attorneys prosecuting such claims before the departments usually charged contingent fees of from twenty to twenty-five per cent, which the plaintiff's witnesses regarded as a reasonable charge. Atkinson, who was at one time third auditor of the treasury, was conversant with the rules of the Treasury Department, and, as sole attorney, rendered services in this case, by preparing and filing printed briefs.

Several prayers for instructions to the jury were presented by the defendants; but the court refused them all, and charged substantially as follows: —

Where an attorney in the exercise of his ordinary labor and calling, and with the instrumentalities of his professional learning and industry, undertakes to work out a desired result for his client, not through personal influence, but through the instrumentalities of the law, — by persuasion, as distinguished from influence, — such an undertaking is not an unlawful one, or contrary to public policy. That, in dealing with the government and its departments, there is frequently and necessarily required a degree of knowledge and skill, and an acquaintance with forms and principles, not possessed by the unlettered citizen, before a person can obtain that which is justly his due.

When, therefore, the class of persons possessing such knowledge perform that labor as attorneys, no reason exists for defeating them of their compensation. If, therefore, Atkinson's employment was that of a professional man in the line of his profession, and not for the purpose of exercising and wielding an undue influence over the administrative officers of the government, and was so engaged by the defendants, the plaintiff is entitled to recover. That, in the absence of any special agreement between the parties as to the amount of his compensation, the law presumes that his reward shall be commensurate with his labor; and, although the percentage or amount which other attorneys have received in similar cases cannot alone govern in this, it is proper to be considered in determining what the intestate's reasonable compensation should be; and that, if they found that the claim was satisfied through the efforts of the deceased, and not those of others, the fact that his death occurred a day or two before the claim was paid does not deprive him of the fruit of his labor.

On the 13th of March, 1873, the jury rendered a verdict for the plaintiff for $9,185.18.

Thereupon the defendants moved for a new trial; which motion was overruled on the nineteenth of that month.

May 3, 1873, the bill of exceptions was signed by the presiding justice, and filed *nunc pro tunc* Aug. 13, 1874.

Sept. 29, 1873, the motion for new trial was heard at the general term of the court on appeal. The decision of the special term was affirmed, and judgment rendered on the verdict of the jury.

The defendants thereupon sued out this writ of error.

Mr. Thomas J. Durant for the plaintiffs in error.

The plea of *lis pendens* filed by defendants below was good in law, and should have been sustained. The court below possesses the same powers and exercises the same jurisdiction as the circuit courts of the United States. Rev. Stat. relating to the District of Columbia, sect. 760. The court of New London County, Conn., was not a foreign court to that of the Supreme Court of the District of Columbia. The courts of the United States are not foreign to the States. U. S. Const., art. 4, sect. 1; Rev. Stat., sect. 905. The judgment of a State

court conclusive in that State is conclusive everywhere. It is put upon the same footing as a domestic judgment. 3 Story on the Const., p. 183, sect. 1307. Hence the pendency of a suit in a State court may be pleaded in an action for the same cause in the courts of the United States. To tolerate the pendency of several suits at the same time for the same cause would be a reproach to the administration of justice. *Earl* v. *Raymond*, 4 McLean, 234, 235.

A contract to prosecute and collect a claim from one of the departments of the government, in consideration of a percentage on or portion of the amount to be collected, is against public policy and the laws, since it virtually assigns a part of the claim, and an interest therein, to him who undertakes the service.

The statute in force at the time this contract is alleged to have been made, and the services were rendered, was sect. 1, act of Feb. 26, 1853 (10 Stat. 170), and is now Rev. Stat. sect. 3477, p. 693.

On the question of public policy the following cases are relied on: *Marshall* v. *B. & O. R. R. Co.*, 16 How. 374; *Tool Co.* v. *Norris*, 2 Wall. 56; *Trist* v. *Child*, 21 id. 541.

The act of 1853 is designed to prevent maintenance and champerty in claims before the departments. Such a contract as the one here in question would be held tainted with both. *Earle* v. *Hopwood*, 99 Eng. Com. Law Rep. (Phila. ed.) 564; *In re Attorneys' and Solicitors' Act*, 1870; Law Reports, division 1, Chancery, 1876, part 4, April 1; vol. i. p. 573.

The objection of the defendant in error that the bill of exceptions in this case is not properly a part of the record cannot be sustained. The eleventh section of the act of March 3, 1863 (12 Stat. 762), reorganizing the courts of this District, provides that any final judgment, order, or decree of said court — that is, the court created by that act — may be re-examined and reversed or affirmed in this court upon writ of error or appeal in the same cases and in like manner as was then provided by law, in reference to the final judgments, orders, and decrees of the Circuit Court of the United States for the District of Columbia. Therefore a writ of error to the Supreme Court of the District of Columbia is governed by the same regulations as is a writ to the circuit courts of the United

States. *Thompson* v. *Riggs*, 5 Wall. 663; *Pomeroy's Lessee* v. *Bank of Indiana*, 1 id. 602.

The record shows that the exceptions were duly taken at the trial. They were subsequently reduced to writing, signed by the justice who presided thereat, and filed *nunc pro tunc*. The case is clearly within the settled practice of courts of error. *Dredge* v. *Forsyth*, 2 Black, 568.

Mr. Edward Lander, *contra*.

The filing of pleas in bar, after judgment sustaining the demurrer to a plea in abatement, is an acquiescence in such judgment. *Bell* v. *Railroad Company*, 4 Wall. 598; *United States* v. *Boyd*, 5 How. 29; *Townsend* v. *Jennison*, 7 id. 706; *Morsell* v. *Hall*, 13 id. 212; *Shepherd* v. *Graves*, 14 id. 505; *Spencer* v. *Lapsley*, 20 id. 264.

There was no error in the judgment of the court below sustaining the demurrer. *Bowen et al.* v. *Joy*, 9 Johns. 219; *West* v. *McConnell*, 5 La. 424; 7 Am. Com. Law, 357; *Lowry* v. *Hall*, 2 Watts & S. (Pa.) 133; *McJilton* v. *Dove*, 13 Ill. 494; *Walsh* v. *Durkin*, 11 Johns. 99; *Salmon* v. *Wootten*, 9 Dana, 422.

The courts of the District of Columbia are not, in the constitutional sense, courts of the United States. They are in the nature of territorial courts, and were established in the exercise of the power of exclusive legislation over the territory selected as the seat of government.

The bill of exceptions filed in this case, Aug. 13, 1874, *nunc pro tunc*, is not legitimately a part of the record. It was not settled and signed within the time required by the sixty-fourth rule of the Supreme Court of the District of Columbia. Being defective, it will not be considered by this court. *Müller et al.* v. *Ehler*, 91 U. S. 249.

The services rendered for which this suit was brought were strictly professional, and clearly within the rule announced in *Wright* v. *Tebbitts*, 91 U. S. 252; *Wylie* v. *Coxe*, 15 How. 415; *Trist* v. *Child*, 21 Wall. 450.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Services were rendered by Robert J. Atkinson, in his lifetime, as attorney for the defendants in prosecuting a claim, in their behalf, against the United States, before the accounting

officers of the Treasury Department; and the plaintiff instituted the present suit in the Supreme Court of the District to recover compensation for those services, including a claim for services rendered by the decedent and by himself, as such administrator, in the same case, since the decease of the intestate.

Process was served; and the defendants appeared and pleaded in abatement the pendency of a prior suit in a State court for the same cause of action, and tendered a certified copy of the prior writ and return in support of the plea; to which the plaintiff demurred, and assigned for cause that the pendency of a prior suit in a State court is no stay or bar to a suit in the court below. Hearing was had; and the court sustained the demurrer of the plaintiff, and gave leave to the defendants to plead to the merits.

Pursuant to that leave, the defendants pleaded *nil debet* and *non assumpsit;* upon which issues were duly joined. Subsequently the parties went to trial; and verdict and judgment were for the plaintiff, in the sum of $9,185.18. Exceptions to the rulings and instructions of the court, and to the refusals of the court to instruct the jury as requested, were filed by the defendants; and they sued out a writ of error, and removed the cause into this court.

Ten errors are assigned by the plaintiffs in error; but, in the view taken of the case, it will not be necessary to give them a separate examination.

Two questions are presented, arising out of the ruling of the court in sustaining the demurrer of the plaintiff below to the plea in abatement filed by the defendants: 1. Whether the defendants did or did not waive the demurrer, by subsequently pleading to the merits. 2. Whether the pendency of a prior suit in a State court is a bar to an action subsequently commenced in the Supreme Court of this District.

Authorities are referred to by the defendant in error, which support the proposition that pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer; and there are many other decided cases to the same effect. *Aurora City* v. *West*, 7 Wall. 92; *Bell* v. *Railroad*, 4 id. 602; *Clearwater* v. *Meredith*, 1 id. 42; *United States* v. *Boyd*, 5 How. 51; *Evans* v. *Gee*, 11 Pet. 85; *Jones* v. *Thompson*, 6 Hill, 621.

Suppose it were otherwise, still it is insisted by the defendant in error that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in a circuit court or in the court below, even though the two suits are for the same cause of action; and the court here concurs in that proposition.

Repeated attempts to maintain the negative of that proposition have been made, and it must be admitted that such attempts have been successful in a few jurisdictions; but the great weight of authority is the other way. *Bowne* v. *Joy*, 9 Johns. 221; *Hatch* v. *Spofford*, 22 Conn. 497; *Maule* v. *Murray*, 7 Term, 466; *Imlay* v. *Ellefsen*, 2 East, 457; *Colt* v. *Partridge*, 7 Met. 572; *Smith* v. *Lathrop*, 44 Penn. St. 328; *Cox* v. *Mitchel*, 7 C. B. N. S. 55; *Wood* v. *Lake*, 13 Wis. 91; *Wadleigh* v. *Veasie*, 3 Sumn. 167; *Loring* v. *Marsh*, 2 Cliff. 322; *White* v. *Whitman*, 1 Curt. 494; *Salmon* v. *Wotten*, 9 Dana, 422; *Yelverton* v. *Conant*, 18 N. H. 124; *Walsh* v. *Durkin*, 12 Johns. 99; *Davis* v. *Morton*, 4 Bush, 444.

Attempt is also made by the defendant in error to maintain the proposition that the allowance of the bill of exceptions is irregular, and that the assignment of errors founded thereon is not properly before the court for re-examination; but the court here is entirely of a different opinion. Due attention to the act reorganizing the courts of the District will remove all doubt upon the subject. 12 Stat. 764.

Provision is made for exceptions to be taken in the trial at the special term, before a single justice. As there provided, exceptions may be reduced to writing at the time, or they may be entered in the minutes of the justice, and settled afterwards, in such manner as the rules of the court provide. Such exceptions must be "stated in writing, in a case or bill of exceptions, with so much of the evidence as may be material to the questions; but the case or bill of exceptions need not be signed or sealed." Sect. 8.

Special regulations are also enacted in respect to motions for new trials; and it is provided that a motion for new trial on a case or bill of exceptions shall be heard, in the first instance, at a general term. Appeals and writs of error to this court are regulated by the eleventh section of the act. Writs of error and appeal, under the prior law, applicable to the District, were

required to be prosecuted in the same manner and under the same regulations as in case of writs of error and appeals from judgments and decrees rendered in the circuit courts of the United States. 2 Stat. 106; *United States* v. *Hooe*, 1 Cranch, 318.

Important changes were undoubtedly made by the act reorganizing the courts of the District; but the eleventh section provides that any final judgment, order, or decree of said court may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same cases and in like manner as is now provided by law in reference to the final judgments, orders, and decrees of the Circuit Court of the United States for the District of Columbia. 12 Stat. 764.

Grant that, and it follows that writs of error from this court to the courts of this District are governed by the same rules and regulations as are writs of error from this court to the circuit courts of the United States. *Thompson* v. *Riggs*, 5 Wall. 676; *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 597.

Unless the exceptions to the rulings of the court in the progress of the trial, or to the instructions of the court given to the jury, are signed by the judge, or sealed with his seal, it is not a bill of exceptions within the meaning of the statute authorizing such proceeding, nor does it become a part of the record. Instead of that, the established rule is, that the exception must show that it was taken and reserved by the party at the trial; but it may be drawn out in form, and signed or sealed by the judge, at a later period. *United States* v. *Breitling*, 20 How. 254.

Decided cases to that effect are very numerous; nor would it be difficult to show that the practice in that regard has been uniform ever since the statute allowing bills of exception was passed by Parliament. *Phelps* v. *Mayer*, 15 How. 260; *Turner* v. *Yates*, 16 id. 28.

Anciently the bill of exceptions was required to be sealed; but it is sufficient, in the practice of this court, if it be signed by the judge, as it was in the case before the court. *Pomeroy's Lessee* v. *Bank*, 1 Wall. 599; *Generes* v. *Campbell*, 11 id. 193; *Mussina* v. *Cavazos*, 6 id. 355.

Beyond doubt, the record must show expressly or impliedly that the exception was taken and reserved by the party at the

trial; but it is a mistake to suppose that it has ever been decided by this court that it must be drawn out and signed or sealed by the judge before the jury retire from the bar. Manifest inconvenience would result from such a requirement; and, in point of fact, there is no such rule. On the contrary, it is always allowable, if the exception is seasonably taken and reserved, that it may afterwards be put in form and filed in the case, pursuant to the order and direction of the judge who presided at the trial. *Dredge* v. *Forsyth*, 2 Black, 568.

Apply that rule to the case before the court, and it is clear that the objection of the defendant in error is without merit, as it appears by the record that the exceptions were "taken at the trial of the cause," and that the bill of exceptions was signed by the judge at the request of the defendants, and filed in the case *nunc pro tunc*, which brings the case within the settled practice of courts of error, even if governed by the strictest rules of the common law.

Coming to the merits, the first objection of the plaintiffs in error is that the contract set up in declaration is one for a contingent compensation. Such a defence, in some jurisdictions, would be a good one; but the settled rule of law in this court is the other way. Reported cases to that effect show that the proposition is one beyond legitimate controversy. *Wylie* v. *Coxe*, 15 How. 415; *Wright* v. *Tebbitts*, 91 U. S. 252.

Professional services were rendered by an attorney, in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the attorney was to receive five per cent of the amount recovered. Valuable services were rendered by the attorney during the lifetime of the claimant; but he died before the claim was allowed. Subsequently, the efforts of the attorney were successful; and he demanded the fulfilment of the contract, which was refused by the administrator of the decedent. Payment being refused, the attorney brought suit; and this court held that the decease of the owner of the claim did not dissolve the contract, that the claim remained a lien upon the money when recovered, and that a court of equity would exercise jurisdiction to enforce the lien, if it appeared that equity could give him a more adequate remedy than he could obtain in a court of law.

Courts of law also adopt the same rule of decision, as sufficiently appears from the second case cited, where the same rule of decision was applied and enforced without hesitation or qualification. Contracts for lobbying stand upon a very different footing, as was clearly shown by the Chief Justice in commenting upon a prior decision, in which the opinion was given by Justice Swayne. *Trist* v. *Child*, 21 Wall. 450.

Nothing need be added to what is exhibited in the case last mentioned to point out the distinction between professional services of a legitimate character, and a contract for an employment to improperly influence public agents in the performance of their public duties. *Tool Company* v. *Norris*, 2 Wall. 53.

Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented or the defence set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation, or unfairness.

By the contract in question, the amount of compensation to be paid was not fixed; and, in order to enable the jury to determine what the plaintiff was equitably entitled to recover, he called other attorneys, and proved what is ordinarily charged in such cases; and the defendants excepted to the ruling of the court, in refusing to charge the jury that they should disregard such testimony.

Attorneys and solicitors are entitled to have allowed to them, for their professional services, what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning, skill, and proficiency; and, for the purpose of aiding the jury in determining that matter, it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practising in the same court. *Vilas* v. *Downer*, 21 Vt. 419.

Tested by that rule, the court is of the opinion that the

prayer for instruction was properly refused. Certain other prayers for instructions were also presented by the defendants, which were refused by the court below; but, in the view taken of the case, it must suffice to say that we are all of the opinion that the ruling of the court in refusing to give the requested instructions was correct.

Enough has already been remarked to show that the theory of the plaintiffs in error, that the contract is prohibited by certain acts of Congress referred to, cannot be sustained, for the reason that the contract was a legitimate one for professional services of an attorney who held no official station at the time the contract was made, nor at any time during the period he was engaged in prosecuting the claim.

Exceptions were also taken to numerous detached portions of the charge of the court; but the remarks already made render it unnecessary to give those exceptions a separate examination. Such an examination would extend the opinion unnecessarily; nor is it necessary, as the court is unanimously of the opinion that the exceptions must all be overruled.

Judgment affirmed.

HUFF v. DOYLE ET AL.

1. The act of Congress of July 23, 1866 (14 Stat. 218), confirming selections theretofore made by California of any portion of the public domain, divided them into two classes; namely, one in which they had been made from land surveyed by the United States before the passage of the act, and the other in which the selected lands had not been so surveyed.
2. Where the surveys had been made before the passage of the act, it was, by the second section thereof, the duty of the State authorities to notify the local land officer of such selection, where they had not already done so. Such notice was regarded as the date of such selection.
3. Where the surveys had not yet been made, the State, under the third section, had the right to treat her selection made before the passage of the act as a pre-emption claim; and the holder of her title was allowed the same time to prove his claim under the act, after the surveys were filed in the local land-office, as was allowed to pre-emptors under existing laws.
4. By a fair construction of these provisions, and others of this statute, and of the act of March 3, 1853 (10 Stat. 244), the exception in the first section confirming these selections, of lands "held or claimed under a valid Mexican or Spanish grant," must be determined as of the date when the claimant,

under a State selection, undertakes to prove up his claim after the surveys have been made and filed, and within the time allowed thereafter to pre-emptors.

5. If at that date the land selected by the State was excluded from such a grant, either by judicial decision or by a survey made by the United States, the claimant may have his claim confirmed.

ERROR to the Supreme Court of the State of California.

Submitted on printed arguments by *Mr. John B. Harmon* for the plaintiff in error, and by *Mr. S. F. Leib*, *contra*.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of California, which brings here for review a judgment of that court concerning a title to land dependent on the act of Congress granting lands to that State for school purposes, of March 3, 1853, and the act of July 23, 1866, on the same subject. 10 Stat. 244; 14 id. 218.

By the sixth section of the first-mentioned act, the State was granted every sixteenth and thirty-sixth section of the public land, for school purposes, with an exception of lands which for various reasons ought not to be so granted; and by the seventh section, the State was authorized to select other lands in lieu of any section or part of section sixteen or thirty-six which fell within any of these exceptions. The act which made these grants was the first which provided for the extension to California of the system of surveys, sales, and pre-emption of public lands so long established in other States and Territories. No surveys had then been made; and it was obvious, that, until they were made, and the precise locality of each township and of the sixteenth and thirty-sixth sections of the township was thus ascertained, it could not be known whether they came within any of the exceptions to the grant, or whether any right of selection in lieu of them had accrued. The State of California, impatient of the delay of the United States authorities in making these surveys, undertook to perform that duty herself; and, assuming from data furnished by her own surveys that a great many acres of the sixteenth and thirty-sixth sections were within one or the other of the exceptions of the granting clause, for which the State was to select other lands, the legislature authorized selections and locations to be made in lieu thereof,

according to State surveys. The land in controversy was so selected by the State and sold to plaintiff, who settled on it in 1865, and received from the State a certificate of sale.

The officers of the Land Department, when the matter was brought to their attention, refused to recognize the surveys made by the State, or to acknowledge the validity of selections and locations made under the State laws; and as many such selections and actual settlements under them had been made, the hardships and embarrassments growing out of the action of the State government caused the passage of the act of July 23, 1866.

By the first section of that act, it was declared "that in all cases where the State of California has heretofore made selections of any portion of the public domain, in part satisfaction of any grant made to said State by act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and are hereby, confirmed to said State."

A proviso excepted out of this confirmation land of various classes, among which is "any land held or claimed under a valid Mexican or Spanish grant." Sect. 2 of the act required the proper land officers, where the land had been surveyed by the United States at the date of the act, to examine into these selections, and, if found to be right, to certify them to the State; and by the third section, provision was made for the perfection of these titles in lands not yet surveyed, after the surveys should have been extended over them.

The land claimed by plaintiff belonged to the latter class; and the official plat of the survey of the township embracing it was not filed in the proper land-office of the United States until June 28, 1871, nearly five years after the passage of the act, and six years after its selection and location by plaintiff. As soon as this was done, — to wit, July 10, 1871, — plaintiff proved up his claim, and the land-office certified the land to the State of California, as provided by the third section of the act, and the State thereupon issued to him his patent. It is upon this title that plaintiff recovered a judgment for the possession of the land in the inferior court of the State of California against defendants, whose claim consisted in the facts found by the

court, that, having the qualifications of pre-emptors of the public land, they had, in November, 1870, intruded upon the possession of plaintiff, had made a declaration of their intention to pre-empt it, and had offered to pay the money, and demanded a certificate of sale, the land officers refusing both to accept their money and to give them a certificate.

The Supreme Court of California reversed this judgment, and ordered a judgment for defendants, on the ground, that, at the time of plaintiff's selection of this land, and of the passage of the act of 1866, it was claimed under a valid Mexican grant.

To determine the correctness of this ruling, it will be necessary to look into the history of that claim.

It appears that at some time prior to 1860 there was confirmed to Robert Livermore a grant of two leagues of land, called Los Pocitas, the out-boundaries of which were given in the decree of confirmation, and which included the land now in controversy. In 1865 a survey of this grant was made, which contained nine leagues, and which was rejected for that reason by the Commissioner of the General Land-Office in 1868. In March, 1869, another survey was made, which contained two square leagues, and did not include the land in suit; and this survey was confirmed by the commissioner June 6, 1871. It will be remembered, that, on the 28th of the same month, the plat of the government surveys was filed in the local land-office, and that, twelve days thereafter, plaintiff presented himself at that office and proved up his claim.

The question for our decision under the facts as found by the court below, and thus more briefly stated, is, whether the action of the officers of the Land Department in certifying these lands to the State as a valid selection of indemnity lands under the act of 1866 was without authority of law, and therefore void. There can be no doubt that they were authorized to inquire into the validity of any claim set up under sect. 1 of that act, and, in the language of the closing paragraph of sect. 3, "if found in accordance with sect. 1," to certify the land to the State. And it may admit of grave doubt, whether in a suit at law the validity of their action can be impeached. It certainly cannot be impeached on any other ground found in this record than that, being part of a valid Mexican claim, the

land was expressly excepted from confirmation, and could not be subjected to it by the act of the land officers in the premises.

It is not to be denied that the facts found show, that, at the date of the act of 1866, the land claimed by defendant was part of a tract claimed under a Mexican grant, and that the grant itself was then, and is still conceded to be, a valid grant. It was, therefore, "claimed under a valid Mexican grant," within the literal terms of the statute. And if this literal construction is to prevail, and the fact of its being claimed under a Mexican grant is to have reference solely to the date of the statute, the Supreme Court of California was right in its decision.

But we see no reason, in the nature of the relief granted by this statute, or in the exception of land covered by Mexican claims, which should make the exception cover land to which no Mexican claim existed at the time the land officers were to decide on the validity of the selection of the State. If there was then no claim, or if it had been judicially determined that it was not valid, the remedial spirit of the statute required that the *bona fide* purchaser from the State should be at liberty to assert his claim to it, as a selection made by the State, and no principle of public policy was infringed by so doing.

That this was the intention of Congress is fairly deducible from other parts of the statute.

As we have already said, sect. 2 has reference to lands which had been surveyed by the government at the date of its passage. As to these lands, it is made "the duty of the proper authorities of the State, where this is not already done, to notify the register of the United States land-office for the district in which the land is located of such selection, which notice shall be regarded as the date of the selection." Now, suppose that prior to this notification the land had been claimed as part of a Mexican grant, but it had been finally determined that, though the grant itself was valid, it did not include the land selected, would not the selection be good? How could it be otherwise, when, at the time which the statute says shall be regarded as the date of the selection, the land was to all intents and purposes restored to the body of the public lands of the United States, by the terms of a statute on that subject? Sect. 13, act of March 3, 1851 (9 Stat. 633).

The reasons why this proposition should prevail as to lands not surveyed at the date of the act are quite as strong; and we find, accordingly, that the third section declares that as to these the selection made under the authority of the State shall have the same force and effect as the pre-emption rights of a settler on the unsurveyed land, and that the holder of the State title shall be allowed the same time after the surveys are made and the plat filed to prove up his purchase and claim as is allowed to pre-emptors under existing laws; "and, if found in accordance with sect. 1 of this act, the land embraced therein shall be certified over to the State by the Commissioner of the General Land-Office."

If found then to be in accordance with sect. 1, the register is to examine his claim, the character, the right asserted, and the certificates under which he claims. He is also to see if it is land subject to be so selected, or land which is excepted from the right of selection. If the papers are right, is he to go back to some past time, and say this land was part of a Mexican claim, though not so now, and reject the application? Or is he to say, Your papers are all right; the land is public land, and open to your claim? If he should doubt on this point, he has but to look to the previous section, where Congress has declared, that, though the land may have been actually selected under State authority years before, yet the date of selection, for the provisions of that act, shall be determined by the notice of the fact at the land-office, delivered after the passage of the statute. See *Toland* v. *Mandell*, 38 Cal. 42, 43.

As strongly tending to the same conclusion, we find that by the sixth section of the act the right of the State to solicit indemnity for school sections included, or supposed to be included, in a Mexican grant accrues only when it shall be found by a final survey of the grant that it does include some part of a sixteenth or thirty-sixth section.

So, also, as we held at this term in the case of *Sherman* v. *Buick*, *supra*, 209, that by the seventh section of the act of 1853 the right of selecting indemnity lands for those on which actual settlements were made must be determined by the actual survey of the grant, and, of course, could not be exercised before that time, and that up to that time a valid settlement

could be made which would deprive the State of the land, though made on what turned out to be a sixteenth or a thirty-sixth section.

In all this we see the purpose of Congress to refer the exercise of the right of the State to select indemnity for school lands to the condition of the lands for which indemnity is claimed, as well as those out of which it is sought, at the time the official surveys are made and filed in the proper office, or as soon thereafter as the right is asserted.

There is, in what we have here said, no conflict with the principles laid down in *Newhall* v. *Sanger*, 92 U. S. 761.

In that case, the claim under the Mexican grant called Moquelamos was still in litigation when the road of the company was located, and when the lands were withdrawn from public sale. These lands were not then public lands within the meaning of the grant under which the corporation claimed.

Here, as we have attempted to show, the land in controversy was public land at the time at which by the statute the State was authorized to assert her right of selection. It is upon the language of the act of 1866, and its special provisions, that we hold that the extent of the Mexican claim having been determined, and all land outside of the final survey restored to the body of the public lands, the State had a right at the time plaintiff proved up his claim to treat it as public land, and have the claim confirmed.

Upon these views we are of opinion that the land in controversy was rightfully certified to the State by the land officers, and that the title of the plaintiff is perfect.

The judgment of the Supreme Court of the State of California is, therefore, reversed, and the cause remanded with directions to affirm the judgment of the District Court of the Third Judical District, county of Alameda.

MR. JUSTICE DAVIS took no part in the decision of this case.

WESTERN UNION TELEGRAPH COMPANY v. ROGERS.

This court has no jurisdiction to review the judgment of a circuit court rendered subsequently to May 1, 1875, unless the matter in dispute exceeds the sum or value of $5,000, exclusive of costs. Interest on the judgment cannot enter into the computation.

MOTION to dismiss a writ of error to the Circuit Court of the United States for the District of Nebraska.

The judgment below was as follows: —

It is considered and adjudged by the court that said plaintiff, Jonathan Rogers, have and recover of and from said defendant, the Western Union Telegraph Company, the sum of five thousand ($5,000) dollars and the costs of this suit, taxed at two hundred twenty and $\frac{33}{100}$ ($220.33) dollars, and that he have execution therefor.

Mr. Montgomery Blair for the defendant in error, in support of the motion, cited *Walker* v. *United States*, 4 Wall. 163.

Mr. G. P. Lowrey and *Mr. J. Hubley Ashton*, *contra*.

The question upon the present motion is, whether this is not in fact and law a judgment for $5,220.33, and, therefore, for an amount greater than $5,000.

The costs are here ascertained, taxed, and liquidated at $220.33; and this is part of the aggregate amount for which judgment is rendered and execution awarded, and which, therefore, exceeds the jurisdictional amount of $5,000.

It is quite inconceivable that a writ of error would be dismissed in a case where the damages amounted to $5,000, or less, and the costs as taxed, and included in the judgment, amounted to, say, $10,000, or any other very large sum.

The principle applicable to the matter is, of course, not affected by the amount of the costs included in the judgment.

Here is a small record of eleven or twelve pages, and the plaintiff's costs have been taxed at $220.33; and if such a judgment is not reviewable by this court under the act of 1875, it is not very easy to see how a party will ever be able to obtain relief against excessive and abusive costs in any case where the damages included in the judgment amount to $5,000, or a less sum.

There can be no taxation of costs, except under the act of Feb. 26, 1853, which repealed absolutely all previous laws on

the subject, and regulates the amount recoverable as legal costs of suit by the successful party. *Lyell* v. *Miller*, 6 McLean, 422; *The Liverpool Packet*, 2 Sprague, 37.

Any taxation of costs in violation of this act (known as the Fee Bill) is error, cognizable by this court.

The third section of the act of 1853 (now Rev. Stat., sect. 983) provides that the bills of fees of the clerk, marshal, and attorney, &c., shall be taxed in conformity with the act, and "shall be filed with the papers in the case."

Where the costs are taxed and liquidated prior to or at the time of the entry of the judgment, and constitute a part of the judgment as rendered, and the whole judgment, including the damages and costs, is for a definite amount, greater than $5,000, this court, we submit, has jurisdiction, under the act of 1875, although the damages recovered may be less than $5,000.

Very often costs are not actually taxed until after the judgment is rendered; and any general judgment for costs, without fixing the amount, would be interpreted to mean legal costs.

In such a case, the judgment, to the extent of the costs, would not be reviewable in this court.

The case of *Walker* v. *United States*, 4 Wall. 163, cited by defendant in error, was a judgment for "the sum of $2,000, with interest thereon," &c.; and the court held, that, in determining the jurisdictional sum, interest on the judgment could not be considered, because interest on a judgment can only arise after rendition, while the jurisdictional amount, if determined by the judgment, is fixed at rendition.

Here there is a definite judgment for $5,000+$220.33 for costs; and for that aggregate amount ($5,220.33) execution is awarded against the defendant, now plaintiff in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Before the act of Feb. 16, 1875 (18 Stat. 316), increasing the sum or value of the matter in dispute, necessary to give this court jurisdiction, from $2,000 to $5,000, after May 1, 1875, it was held that we had no jurisdiction in cases where the matter in dispute was $2,000, and no more, and that in determining the jurisdictional amount "neither interest on the judgment

nor costs of suit can enter into the computation." *Walker* v. *United States*, 4 Wall. 164; *Knapp* v. *Banks*, 2 How. 73. The act of 1875 simply increases the jurisdictional amount. No other change is made in the old law. The judgment in this case was rendered May 8, 1875, for $5,000 and no more, except costs. It follows that, according to the practice established under the old law, this writ must be

Dismissed for want of jurisdiction.

COUNTY OF CALLAWAY v. FOSTER.

1. The powers of a railroad company, in Missouri, in existence prior to the adoption of the constitutional provision of 1865, prohibiting subscriptions to the stock of any corporation by counties, cities, or towns, unless two-thirds of the qualified electors thereof shall assent, are not affected by such provision, but remain the same as if it had never been adopted.
2. The power conferred by the statute of Missouri of March 10, 1859, upon a county in which may be any part of the route of the Louisiana and Missouri River Railroad Company, to subscribe to the capital stock of that company without submitting the question of such subscription to the vote of the people, was not taken away by the amendatory act of March 24, 1868.
3. Every reasonable construction of the language of the act of March 10, 1859, embraces the county of Callaway, and the road has been actually located through it.
4. The subscription to the stock of the railroad company, having been actually made by that county, under the authority of a legislative act, in January, 1868, was legal, and the circumstance that the bonds were issued at a later date does not impair their validity.

ERROR to the Circuit Court of the United States for the Western District of Missouri.

A copy of the bonds and coupons in question, and a full statement of the statutory provisions governing the case and of the facts shown in the record, are set forth in the opinion of the court.

Argued by *Mr. William M. Evarts* for the plaintiff in error, and by *Mr. J. D. Stevenson* for the defendant in error.

MR. JUSTICE HUNT delivered the opinion of the court.

This is one of the bond cases of which so many have been brought before this court within the last few years. The county

of Callaway, in the State of Missouri, subscribed to the stock of a railroad to be built through the county, and issued its bonds to raise the money to make payment therefor. The road has been built, is in full operation upon the route selected by the county, and the county holds its stock.

The county court making the subscription paid the interest for two years upon the bonds, and a portion of the principal. Another county court has since been elected, which refuses to pay either principal or interest.

The plaintiff below, a citizen of the State of Kentucky, paid his money for a portion of these bonds, and brings the present suit to recover the amount. The court adjudged that the bonds must be paid. The county appeals to this court.

The bonds were issued under the act of the general assembly of Missouri, entitled "An Act to incorporate the Louisiana and Missouri River Railroad Company, approved March 10, 1859" (see Acts Mo. 1858, p. 406), as amended by an act approved March 24, 1868 (Acts Mo. 1868, p. 97).

Sect. 29 provided that "it shall be lawful for the county court of any county in which any part of the route of said railroad may be to subscribe to the stock of said company, and issue bonds of such county to raise funds to pay the stock thus subscribed."

Sect. 22 of the amendatory act of March 24, 1868, is as follows: "It shall be lawful for the company to mark out, locate, and construct a branch of its road. . . . And all subscriptions to the capital stock of said company intended to be used in the construction of said branch shall be made in separate books."

On the 16th of January, 1868, the county court of Callaway County authorized a subscription of $500,000 to the capital stock of the said railroad company.

The record shows that on the same day, — to wit, on the sixteenth day of January, 1868, — Harris, the authorized agent, subscribed for the stock, and received the certificates therefor.

The following is a copy of one of the bonds issued by the county, with coupon attached, to raise the money to pay such subscription, and which is now held by the plaintiff below: —

"No. ——.] STATE OF MISSOURI. [$100.

"CALLAWAY COUNTY RAILROAD BOND.

"On the first day of January, A.D. 1873, the county of Callaway promises to pay to the Louisiana and Missouri River Railroad Company, or bearer, the sum of $100, to bear interest from date, at the rate of nine per cent per annum, payable semi-annually on the first day of January and July in each year, as per coupons attached hereto, and after maturity to bear the same rate of interest until paid, said principal sum and interest being payable at the Missouri Bond and Stock Board of St. Louis, in the City of St. Louis, Mo. This bond is issued by Callaway County, by authority of the act of the general assembly of the State of Missouri, approved March 10, 1859, as amended by an act approved March 24, 1868.

"Witness my hand, with the seal of said county affixed, this first day of January, 1869.

"[L. S.] GEO. BARTLEY,

"*Presiding Justice of Callaway County Court.*

"Attest: W. H. BAILEY,

"*Clerk of Callaway County Court.*

"COUPON.

"On the first day of January, 1873, Callaway County will pay to the bearer the sum of $4.50 at the Missouri Bond and Stock Board of St. Louis, Mo., interest on Railroad Bond No. —.

"GEO. BARTLEY,

"*Presiding Justice of Callaway County Court.*

"W. H. BAILEY,

"*Clerk of Callaway County Court.*"

If this subscription was made by virtue of the act of March 10, 1859, before referred to, it is not contended that the bonds are invalid. This is understood to be conceded in the second point made in the brief of the plaintiff in error.

On the other hand, if the subscription depends solely for its validity upon the act of March 24, 1868, it is contended that the subscription was without the authority of law, and that the bonds issued in its fulfilment are void.

The distinction is this: On the 8th of March, 1859, a county might legally be empowered by the legislature of Missouri to make a subscription to railroad stock upon its own motion, and to issue bonds in fulfilment of the obligation. Before the 24th of March, 1868, — to wit, in July, 1865, — a constitutional

provision was adopted, in these words: "The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

It is not pretended that the assent of the voters of Callaway County to the subscription in question was given.

The facts upon this branch of the case are, that the subscription to the railroad stock was authorized by the county court, and actually made by their agent before the act of March, 1868, was passed; that the certificates of stock in said company were issued to and received by the county at the time of making such subscription, but that the bonds of the county in question were not issued until a date after the passage of the latter act, — to wit, in January, 1869, — and that the original charter was in several particulars altered by the amending act of 1868.

1. It has been held in many cases by the Supreme Court of Missouri, that the provision of the constitution of 1865, prohibiting loans or subscriptions for stock, except with the assent of the electors, is prospective, not retroactive; that the charter of a company which is in existence before the adoption of the constitutional provision is not affected by it, but the powers given by it remain as if no such constitution existed. *State* v. *Macon County Court*, 41 Mo. 453; *Smith* v. *County*, 9 Clark, 54 id. 58. Although put into execution by making the subscription or issuing the bonds after the adoption of the constitution, the power remains valid.

2. The constitution of 1865 contains, in connection with the provision already quoted, the following: "All statute laws of the State now in force, not inconsistent with the constitution, shall continue in force until they shall expire by their own limitations, or be amended or repealed by the general assembly." In *State of Missouri* v. *Cape Girardeau & State Line Railroad*, 48 Mo. 468, it was held, that the constitutional provision prohibiting special enactments did not extend to amendments of laws in force when it was adopted, but that additional power given to the Cape Girardeau Railroad, by the means of

an amendment to its charter, was a lawful exercise of authority. The cases before cited show that the act we are considering is not inconsistent with the constitution, as it continued in force after its adoption as before.

It is difficult to discover any principle which can distinguish an amendment to the charter of the Louisiana and Missouri River Railroad Company, altering its terms and conditions within its original limits, and of the general nature and scope of its original charter, from the Cape Girardeau case. The case of *State* v. *Saline Co.*, 51 Mo. 350, does not conflict with this principle.

3. The act of March, 1868, referred to in the Callaway County bonds, in connection with the act of March 10, 1859, was an amendment of the latter act.

It expressly declares itself to be an amendment of the first act. Its title is, "An Act to amend an act entitled an act to incorporate the Louisiana and Missouri Railroad Company, by increasing the amount of the capital stock of the said company, defining more explicitly the power of the board of directors to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers to carry into effect the several objects contemplated by their charter, and also by striking out sects. 11, 18, 30, and 31 of said act." Laws of Mo. 1868, p. 103.

That the title may properly be examined, and is competent, see *Cin. L. I. C.* v. *Abbott*, 39 Mo. 181; *State* v. *Saline Co.*, 51 id. 392; 14 id. 205.

The several objects appear to be legitimate subjects of amendment, and it would ill become us to impute to the legislature of a State an intention to evade the provisions of its own constitution, under the guise of an amendment. There is no indication of such an intention in the case we are considering.

The form in which the amendment is made, by a new act throughout, is explained by that article of the Missouri Constitution which requires that no amendment of an act can be made by striking out and inserting any words, but that "the act or part of act amended shall be set forth and published at length as if it were an original act." Accordingly, the amend-

ment is here made, not by making provision merely for the new points, but by re-enacting the whole of the original act in all its details, with the alterations, where they are intended to be made. A collation of the provisions of the two acts make this point quite clear.

The amended charter attaches to itself all the qualities and privileges of the old one. *State* v. *Greene Co.*, 54 Mo. 540; *State* v. *Callaway Co.*, 51 id. 395; *State* v. *Sullivan Co.*, id. 522.

This view is an answer to the objections that the transfer of the subscription was made to a branch road, and an issue of bonds made under that subscription, and that such authority only existed under the power conferred by the act of 1868. The branch was the original road, so far as Callaway was concerned, with a change of name simply, and the amendment became a part of the original act.

We find no difficulty, therefore, in holding that a county, included in the terms of the original act, had power upon its own authority to subscribe for the stock, and that a submission of the question to the electors of the county was not necessary.

The power of this county to subscribe as one of the counties intended to be included within the terms of the original act is reasonably plain.

The twenty-ninth and thirty-fifth sections are as follows: —

"SECT. 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and any city, town, or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interest, give its vote, and receive its dividends, and may take proper steps to guard and protect the interest of said city, town, or incorporation."

"SECT. 35. Said company shall have power to mark out, locate, and construct a railroad from the city of Louisiana, in the county of Pike, by the way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsburg, in Montgom-

ery County, and the northern limits of the town of Mexico, in Audrain County, thence to the Missouri River at the most eligible point, on a line the most suitable and advantageous as regards distance, grade, cost of road, and permanent value of same."

The starting-point of the road was fixed at Louisiana, in the county of Pike. Two points only in the route were indicated; to wit, Bowling Green, and the crossing of the Missouri Railroad between the outer limits of the towns of Wellsburg and Mexico. The termination was to be upon the Missouri River at the most eligible point, distance, grade, cost of road, and permanent value considered. The county of Callaway furnished all the requisites thus set forth. The road as ultimately built did pass through Bowling Green, across the Missouri road between the towns of Mexico and Wellsburg, thence through the whole length of the county of Callaway to a point opposite Jefferson City on the Missouri River. We discover nothing to show that this point might not properly have been decided by the company to have been a more suitable and advantageous place at which to terminate its road than any other upon the Missouri River.

The statute already quoted provides that "it shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company." "May be" what? This expression is incomplete, and is to be construed with reference to the situation of the subject-matter. If used in a statute where a railroad already built was the subject, it would no doubt refer to the presence or existence there of the road. It would be equivalent to the word "exists," or "is built," or "in operation," or the like. But when used in reference to a railroad not yet built, not located or surveyed, and indeed not yet organized, it must have quite a different meaning. Certain points were given for the location of the road; as, that it must start from a city named, it must pass through one place mentioned, and must pass between two others, and must terminate on the Missouri River. The map given in evidence shows that there was a large room for choice thus left in the company. It might pass through Howard and Boone Counties, terminating at Glasgow, and omitting Callaway, or it might pass through Callaway, termi-

nating opposite Jefferson City, omitting Howard and Boone. This was the intention of the legislature; for the double purpose, no doubt, of enabling the company to select the best route, and of stimulating rivalry among the different localities which might wish to obtain the benefit of the location. A broad construction of the language would be to say that it meant to authorize a subscription by any county in which the road may by law be located. This would include all the counties before named. It might be held to authorize a subscription by any county in which the road may be in fact ultimately located.

It is, perhaps, not necessary to pass upon this point with any more precision than to say, that, upon any reasonable construction of the language, it embraces Callaway, which was one of the possible sites, and a site ultimately occupied, in fact.

We are of the opinion, therefore, that the subscription actually made by the county of Callaway, in January, 1868, was legal, and that the circumstance that the bonds were issued at a later date is an immaterial one.

We are of the opinion, also, that the amendments of the charter, and the subsequent action by which the portion of road from Mexico through Callaway County, and under such amendments was made a branch road, and the portion from Mexico to Glasgow was called the main road, and that the bonds were issued both under the act of 1859 and the act of 1868, if such were the fact, do not affect the case. The latter act is an amendment and continuation of the former, and refers to what was then termed a branch road.

Nor do we perceive that it is necessary to invoke the principle of *bona fides*.

If our views are sound, the bonds were legally issued under the authority of a legislative act, and are valid in the hands of any one who has a legal title to them.

We are of the opinion that the case was well decided by the Circuit Court. *Judgment affirmed.*

MR. JUSTICE MILLER, with whom concurred MR. JUSTICE DAVIS, MR. JUSTICE FIELD, and MR. JUSTICE BRADLEY, dissenting.

I dissent from the judgment of the court, on the ground that

the subscription of stock to the railroad company in this case could only be made under the amendatory act of March 24, 1868, and that the constitution of the State then required a vote of the county to make such subscription valid. As there was no such vote, and no recital in the bond or elsewhere to show that there was, the bonds were void.

THE "IDAHO."

1. Actual delivery by the bailee on the demand of the true owner, who has the right to the immediate possession of the goods bailed, is a sufficient defence of the bailee against the claim of the bailor, and there is no difference in this regard between a common carrier and other bailees.
2. While a contract of bailment undoubtedly raises a strong presumption that the bailor is entitled to the thing bailed, it is not true that the bailee thereby conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed, — to restore it, *or to account for it*. He does so account for it when he has yielded it to the claim of one who has a right paramount to that of his bailor.
3. If there be any estoppel on the part of the bailee, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner.
4. Nor can it be maintained that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner.
5. Whether the shipper has obtained, by fraud practised upon the true owner, the possession he gives to the carrier, or whether he mistakenly supposes he has rights to the property, his relation to his bailee remains the same. He cannot confer rights which he does not possess; and, if he cannot withhold the possession from the true owner, one claiming under him cannot.
6. While a bailee cannot avail himself of the title of a third person (though that person be the true owner), for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title, he is not answerable if he has delivered the property to its true owner at his demand.
7. Without asserting that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, the court holds, that, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and that it will represent the ownership of the goods. Their subsequent removal from the vessel by a person other than the true owner, either with or without the consent of her officers, cannot divest that ownership.

8. The taking possession of property by one not its owner, or authorized by him, shipping it, obtaining bills of lading from the carriers, indorsing them away, or even selling the property and obtaining a full price for it, can have no effect upon the rights of the owner, even in the case of a *bona fide* purchaser.
9. The statutes of Louisiana prohibit the issue of bills of lading before the receipt of the goods; but they do not forbid curing an illegal bill by supplying goods, the receipt of which have been previously acknowledged.
10. If the owner of goods wilfully and wrongfully mixes them with those of another of a different quality and value, so as to render them undistinguishable, he will not be entitled to any part of the intermixture.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The libellants claim damages against the "Idaho" for the non-delivery of one hundred and sixty-five bales of cotton, part of a shipment of two hundred bales for Liverpool, made by Thomas W. Mann, and consigned to the order of James Finlay & Co. After the shipment, the libellants purchased the cotton from Mann, who indorsed to them the ship's bill of lading therefor. On the arrival of the vessel at Liverpool, thirty-five bales were delivered to Finlay & Co., but the remaining one hundred and sixty-five were delivered to Baring Brothers & Co., in pursuance of an order from William J. Porter & Co. of New York. Such a delivery was not in accordance with the stipulations of the bill of lading; but it is attempted to be justified by the alleged fact that Porter & Co. were the true owners of the cotton, and as such had a right, superior to that of the shippers, to control its delivery.

In April, 1869, at New Orleans, W. J. Porter & Co., in due course of business and in good faith, advanced to one Forbes a large sum of money upon a bill of lading, which set forth a shipment of one hundred and forty bales of cotton at New Orleans, in the brig "C. C. Colson." The bill of lading was in the ordinary form, executed by the lawful master of the "Colson," but, in fact, the cotton had not been shipped at the time of its execution. Some few days after the date of the bill of lading, and after the acceptance of the drafts by Porter & Co., Forbes did ship by the "Colson" one hundred and forty bales of cotton, as and for that described in the bill of lading sent to Porter & Co. This cotton was duly delivered to the "Colson," was receipted for by the officers of the brig, and,

although not then placed on board, was delivered to the vessel on the wharf alongside.

Subsequently to this shipment, and before the cotton was taken into the hold of the brig, Forbes removed it from the custody of the brig and shipped it on the steamship "Lodona," lying near, and bound for New York. The previous shipment of the cotton on the "Colson" was unknown to the officers of the "Lodona," and they issued bills of lading in the ordinary form for the cotton they received.

Forbes shipped in the "Lodona" twenty-five other bales, and took one bill of lading for the whole one hundred and sixty-five; on which second bill of lading he obtained a large advance from Schaefer & Co., of New York, to whom he made a second assignment of the cotton.

The bill of lading for one hundred and sixty-five bales, which was sent to Schaefer & Co., included the one hundred and forty bales which had been taken from the "Colson" and delivered to the "Lodona." The "Lodona" arrived in New York on the 29th or 30th of April. The one hundred and sixty-five bales were taken directly to a warehouse by Schaefer & Co., who, on the 1st of May, engaged freight in the "Idaho" for two hundred bales. On the same day, Schaefer & Co. sent for one Corcoran, who went to Schaefer's house on the next day (Sunday), and was then directed to remove all the marks and numbers from the one hundred and sixty-five bales, and re-mark them with marks similar to thirty-five other bales, which Schaefer & Co. had stored in West Street. Corcoran did this as well as the short time permitted; and on Monday the two hundred bales — one hundred and twenty of them marked S. A. L., and eight marked V. O. X. — were shipped in the "Idaho." This shipment was not made in Schaefer's name; but, while Corcoran was at work on the cotton, it was nominally sold to Mann, Schaefer's clerk, and was shipped in the name of Conklin & Davis, grocers, who permitted their names to be thus used, and who indorsed the ship's receipts over to Mann. On the 4th of May Mann applied for and received the bill of lading of the "Idaho" for the two hundred bales on which this action is brought. On the same day Mann made a nominal sale of the cotton to Hentz & Co., free on board.

Hentz & Co. were told to ask no questions; and on the 5th or 6th gave their note for the cotton to Mann, who paid it to Schaefer, who held it till maturity, and when Hentz & Co. paid the amount of it to Mann they obtained Schaefer's guaranty against loss. Mann then paid the money over to Schaefer, who gave him a check for $897.36, as for a difference in price between the sale to Mann and his sale to Hentz & Co. Hentz & Co. acted under the direction of Schaefer & Co., the real parties in interest here in bringing this suit.

The court below dismissed the libel, and the libellants appealed here.

Mr. R. T. Merrick, for the appellant.

A carrier cannot set up a naked *jus tertii* or adverse title of a hostile claimant against his shipper, nor show, as an excuse for non-delivery according to the terms of the bill of lading, that he has delivered the goods to the true owner. Story, Bailm. (8th ed.), sects. 266, 450, 582; 2 Story, Eq. Jur., sect. 817; *Dixon* v. *Hammond*, 2 B. & Ald. 310; *Roberts* v. *Ogelby*, 9 Price, 269; *Gosling* v. *Bernie*, 7 Bing. 338; *Burton et al.* v. *Wilkenson et al.*, 18 Vt. 186; *Gerbur* v. *Monie*, 56 Barb. 659; *Barnard* v. *Kobbe*, 3 Daly, 376.

If the one hundred and forty bales of cotton that had been unloaded at the wharf in New Orleans, at which the "Colson" was lying, were, in fact, part of the two hundred bales shipped on the "Idaho," for which libellants held the bill of lading, there was no such intermixture of said cotton as justified the application of the rule of law in regard to a confusion of goods. 2 Kent's Com. 365; 1 Story, Eq. Jur., sect. 623; *Lupton* v. *White*, 15 Ves. 442; Wood's Inst. 158; *Treat* v. *Barber*, 7 Conn. 280; *Seymour* v. *Wyckoff*, 10 N. Y. 213; Story, Bailm., sect. 40, pp. 41, 42 (8th ed.).

Mr. William G. Choate, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

In determining the merits of the defence set up in this case, it is necessary to inquire whether the law permits a common carrier to show, as an excuse for non-delivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has

been much debate in courts of law, and some contrariety of decision.

In Rolle's Abr. 606, tit. "Detinue," it is said, "If the bailee of goods deliver them to him who has the right to them, he is, notwithstanding, chargeable to the bailor, who in truth has no right;" and for this, 9 Henry VI. 58, is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner (id. 607), for which 7 Henry VI. 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced, can hardly command assent now. It is now everywhere held, that, when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery, according to the directions of the bailor. *Bliven* v. *Hudson River Railroad Co.*, 36 N. Y. 403. And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect. *King* v. *Richards*, 6 Whart. 418; *Bates* v. *Stanton*, 1 Duer, 79; *Hardman* v. *Wilcock*, 9 Bing. 382; *Biddle* v. *Bond*, 6 Best & S. 225. If it be said, that, by accepting the bailment, the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer, that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed, — to restore it, or to account for it. *Cheeseman* v. *Exall*, 6 Exch. 341. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. *Biddle* v. *Bond*, *supra*. Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or

where the shipper has obtained the goods by fraud from the true owner. It is true, that, in some of the cases, fraud of the shipper has appeared; and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess; and, if he cannot withhold the possession from the true owner, one claiming under him cannot. The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge, that, if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. In the late case of *Biddle* v. *Bond*, *supra*, decided in 1865, it was so decided; and Blackburn, J., in delivering the opinion of the court, said there was nothing to alter the law on the subject in the circumstance that there was no evidence to show the plaintiff, though a wrong-doer, did not honestly believe that he had the right. Said he, the position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person whose title is set up, or fraudulently acting in derogation of them. In *Western Transportation Company* v. *Barber*, 56 N. Y. 544, the Court of Appeals of New York unanimously asserted the same doctrine, saying, "The best-decided cases hold that the right of a third person to which the bailee has yielded may be interposed in all cases as a defence to an action brought by a bailor subsequently for the property. When the owner comes and demands his property, he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." The court repudiated any distinction between a case where the bailor was honestly mistaken in believing he had the right, and one where a bailor obtained the possession feloniously or by force or fraud; and we think no such distinction can be made.

We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him, without any pretence of ownership. But if he has performed his legal duty by delivering the property to its true proprietor, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees.

Recurring, then, to the inquiry whether Porter & Co. — to whose order the steamer delivered the one hundred and sixty-five bales of cotton — were the true owners of the cotton, a brief statement of the evidence on which their title rests is necessary. It originated as follows: On the 1st of April, 1869, one J. C. Forbes obtained from the master of the brig "Colson," then lying at New Orleans, a bill of lading for one hundred and thirty-nine bales of cotton, described by specified marks. The bill was indorsed, and forwarded by Forbes to Porter & Co.; and drafts against it to a large amount were drawn upon them, which they accepted, credited, and paid on or before the 7th of the month. In fact, however, when the bill of lading was given, no such cotton had been received by the brig; but on the 5th of April the agent of Forbes bought one hundred and forty bales, then at the shipper's press, and directed them to be sent to the "Colson," marked substantially as described in the bill of lading. These bales were accordingly delivered from the press to the brig on the 8th of April, and the first and second mate receipted for them. They were not actually taken on board, but they were deposited on the pier, at the usual and ordinary place for the receipt of freight by the "Colson," and an additional bill of lading for one bale only was taken by Forbes, and by him indorsed and transmitted to Porter & Co., together with an invoice of the one hundred and forty bales corresponding with the bills of lading. The marks and numbers on the bales were the same as those mentioned in the bills of lading, excepting only that thirty-five were marked L instead of thirty-six, and sixteen marked S instead of fifteen. There was also a small difference in the aggregate weight.

That the cotton thus delivered to the "Colson" was intended to fill the bills of lading, one of which had been previously given, is incontrovertible. They were so intended by the shipper. If not, why were they thus marked? And why was a bill of lading taken for one bale only, instead of for one hundred and forty; and why was the invoice of the whole number sent? Such, also, was plainly the understanding of the ship. The receipts of the mates, and the fact that the master gave a bill of lading for one bale marked S, when there were sixteen bales thus marked, leave this beyond reasonable doubt. What, then? Why, the one hundred and forty bales thus shipped became from the moment of shipment the property of Porter & Co., to whom the bills of lading were indorsed. It is not only the utterance of common honesty, but the declaration of judicial tribunals, that a delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery. At that instant it becomes evidence of the ownership of the goods. Thus, in *Rowley* v. *Bigelow*, 12 Pick. 307, it is said, a bill of lading operates by way of estoppel against the master, and also against the shipper and indorser. "The bill acknowledges the goods to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipper's own warehouse, . . . and afterwards they are placed on board, as and for the goods embraced in the bill of lading, as against the shipper and master the bill will operate on those goods by way of relation and estoppel." Such is also the doctrine asserted in *Halliday* v. *Hamilton*, 11 Wall. 565, and it is in harmony with the general rules that regulate the transfer of personal property. We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods. The cotton delivered on the 8th of April on

the pier for the "Colson," and received by the mates of the brig, became, therefore, at the instant of its delivery, the property of Porter & Co., who were then the indorsees of the bills of lading. Its subsequent removal by Forbes to the "Ladona," either with or without the consent of the brig's officers, could not divert that ownership.

There is nothing in the statutes of Louisiana which requires a different conclusion. Those statutes prohibit the issue of bills of lading before the receipt of the goods, but they do not forbid curing an illegal bill by supplying goods, the receipt of which have been previously acknowledged. The statutes are designed to prevent fraud. They are not to be construed in aid of fraud, as they would be if held to make a delivery of goods to fill a fraudulent bill of lading inoperative for the purpose.

The title of Porter & Co. to the one hundred and forty bales must, therefore, as we have said, be held to have been perfected when they were delivered to the "Colson" on the 8th of April. No right in any other person intervened between the issue of the bill of lading and the brig's receipt of the cotton to fill it. It was after the title of Porter & Co. had thus become complete that Forbes removed the one hundred and forty bales from the custody of the "Colson" and shipped it for New York on the "Ladona," together with twenty-five other bales, re-marking it, and drawing drafts against this second shipment upon Schaefer & Co. After carefully examining the evidence, we cannot doubt that the one hundred and forty bales thus withdrawn from the "Colson" were shipped on the "Ladona," and that they came to the possession of Schaefer & Co., in New York, by whom they were transferred, together with the other twenty-five bales, to Mann, under whom the plaintiffs claim. The one hundred and sixty-five bales, then, are the identical bales that were included in the shipment on the "Idaho," and for which the bill of lading was given to Mann. Of these, one hundred and forty were the property of Porter & Co., fraudulently withdrawn from their possession. It is hardly necessary to say that the title of the true owner of personal property cannot be impaired by the unauthorized acts of one not the owner. Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading,

or even selling the property and obtaining a full price for it, can have no effect upon the right of the owner. Even a *bona fide* purchaser obtains no right by a purchase from one who is not the owner, or not authorized to sell. It must, therefore, be concluded that Porter & Co. were the owners of at least one hundred and forty of the bales shipped by Mann on the "Idaho," and covered by the bill of lading to enforce which this libel was filed.

All that remains to be determined is whether Porter & Co. had a right to the possession of the additional twenty-five bales shipped with the one hundred and forty from New Orleans on the "Ladona," and shipped also on the "Idaho" for Liverpool, together with the thirty-five bales delivered there to Finlay & Co. When the one hundred and forty bales were removed from the custody of the "Colson" and taken to the "Ladona," twenty-five other bales were mingled with them. On the pier opposite that vessel they were re-marked, and all shipped as one lot, under one bill of lading. When they reached New York, they came into the possession of Schaefer, the indorsee of the bill of lading given by the "Ladona," who knew, when he received them, that the "Colson" was short eight hundred or one thousand bales. The newspapers had contained articles about the fraud. He himself was a sufferer. He held some of the fraudulent bills of lading of the "Colson," and he had heard that Porter was in the same condition. So he has testified. With this knowledge he set to work to guard against the possibility of tracing the cotton. He caused the "Colson" marks to be removed from the one hundred and forty bales, and the "Ladona" marks to be removed from both the one hundred and forty and the twenty-five bales. He then had the whole re-marked, making no distinction between the lot of one hundred and forty and that of twenty-five, thus practically making the bales undistinguishable. In addition to this, by an arrangement between himself and Mann, his clerk, in the form of a sale, the cotton was shipped *en masse* by the "Idaho." It is impossible for us to close our eyes upon the nature and purpose of this transaction. It was a perfect confusion of the one hundred and forty bales that belonged to Porter with the other twenty-five; and it was not accidental. It was purposely made, with an

intent to embarrass or hinder the owner, and prevent him from recovering his original property. There is no conceivable motive for Schaefer's obliterating the marks, both of the "Colson" and "Ladona" shipment, in so much haste (ordering it done on Sunday), and substituting new marks, except to destroy the evidence of title in any other person. That such was Schaefer's purpose may also be inferred from his conduct in selling the same to Mann; from Mann's sale on the same day to the libellants, telling them he did not wish them to ask whether the cotton was really Schaefer's, stating, also, that he had bought from Schaefer, and that Schaefer guaranteed the transaction; from Mann's turning over the libellants' note immediately to Schaefer, and Schaefer's giving a guaranty before its payment that the maker should be held harmless. The whole arrangement was manifestly a scheme of Schaefer to obscure the title to the cotton, to prevent its being traced by the true owner, — a scheme in the execution of which he was aided by Mann and the libellants.

Now, what must be the legal effect of all this? What the effect of intermingling the twenty-five bales with the one hundred and forty that belonged to Porter, in such a manner that they could not be distinguished, and so completely that it is impossible for either party to identify any one of the one hundred and sixty-five bales as a part of the lot of twenty-five, or of the larger lot of one hundred and forty, shipped on the "Colson"? We can come to no other conclusion than this: the right of possession of the whole was in Porter, and neither he who caused the confusion, nor any one claiming under him, is entitled to any bale which he cannot identify as one of the lot of twenty-five. It is admitted, the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree, that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his

proportion, or any part, of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. Thus it was ruled in *Ryder* v. *Hathaway*, 21 Pick. 306. Such is the present case. The confusion of the bales of cotton was not accidental. It was purposely made. The intermixture was evidently intended to render any identification of particular bales impracticable, and to cover them against the search of a suspected owner. It was, therefore, wrongful. And the bales were not of uniform value. They differed in weight and in grade. But even if they were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrong-doer to reclaim his own, if he can identify it, or to demand his proportional part. *Stephenson* v. *Little*, 10 Mich. 447. The libellants have made no attempt to identify any part.

See, upon this subject of confusion of goods, 2 Kent's Com. (11th ed.) 364, 365; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62, 108; *Weil* v. *Silverston*, 6 Bush (Ky.), 698; *Hesseltine* v. *Stockwell*, 30 Me. 370.

It follows from all we have said that the delivery by the "Idaho" of the one hundred and sixty-five bales, to the order of Porter & Co., was justifiable, and that the libellants have sustained no legal injury. *Decree affirmed.*

UNITED STATES *v.* THOMPSON ET AL.

Judgments in the State courts against the United States cannot be brought here for re-examination upon a writ of error, except in cases where the same relief would be afforded to private parties.

ERROR to the Court of Appeals of the State of Maryland.

In the progress of a suit pending in the Circuit Court of Queen Anne's County, Md., to settle the affairs of McFreely & Hopper, an insolvent partnership, and to collect and apply the

assets of the firm to the payment of its liabilities, the United States presented a petition for the allowance of a claim in their favor, and its payment out of the fund in court in preference to other creditors, on account of the priority given to debts due the United States by the act of March 3, 1797. 1 Stat. 515, sect. 5; Rev. Stat. sect. 3466.

This petition was referred to an auditor, to take testimony, and report. The facts, as they appear in his report, are substantially as follows: —

Thompson, one of the appellees, was a deputy-collector of internal revenue for the first district of Maryland. In the course of his business he permitted McFreely & Hopper to dispose of and receive the money for internal-revenue stamps, which had been furnished him by the United States to sell. On a settlement with the firm, in December, 1865, there was found due him on that account between $1,500 and $1,600. During the same month of December he held checks received from various parties in payment of internal-revenue taxes, and these he indorsed and delivered to the firm to collect for him. The money was collected, and deposited in bank to the credit of the firm. Some time in February, 1866, the firm gave Thompson a check for $3,000, to pay the amount due him for stamps and checks, — viz., $2,537, — and an amount that was due to him on account of other transactions. With this check, and other checks and current notes, he obtained from the National Exchange Bank of Baltimore a certificate of deposit payable to the treasurer of the United States, for about $24,000. This was at once remitted to the treasurer, to whom it was afterwards paid. Some days after, the check of McFreely & Hopper was protested; and Thompson took it up from the National Exchange Bank, using therefor moneys belonging to the United States in his hands as deputy-collector. Sept. 1, 1866, McFreely & Hopper took up the check from him, paying in money all but $2,537, and giving him their note for that amount, with two sureties, payable one day after date.

This note Thompson presented for allowance, as a claim in his favor. The United States claimed, on account of the money originally received for the stamps sold and checks collected.

The auditor reported against the United States, upon the ground, that, even if they ever had any claim against the firm, it was extinguished by the payment of the certificate of deposit to the treasurer. The report of the auditor was confirmed by the Circuit Court, and a decree entered accordingly. This decree was affirmed by the judgment of the court of appeals. The present writ of error to that court was sued out.

Mr. Assistant Attorney-General Smith for the plaintiff in error. No opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Judgments in the State courts against the United States cannot be brought here for re-examination upon a writ of error, except in cases where the same relief would be afforded to private parties. It was conceded upon the argument in behalf of the United States, that the question of priority of payment, under the laws of the United States, was not decided in the court below, because it was found that there was no debt due. With this concession, which could not be avoided, it is difficult to see what Federal question there is in the record.

It appears affirmatively that the Circuit Court rejected the claim, because it had been paid; and the presumption, in the absence of any showing to the contrary, is, that the Court of Appeals based its decision upon the same ground. But, in addition to this, on looking into the opinion which has been sent here as part of the record in that court, we find that all questions as to the original liability of McFreely & Hopper to the United States were expressly waived, and the decision placed solely upon the ground that "any claim the United States may have ever had against the firm, growing out of these dealings with Thompson, has been paid and extinguished."

It is not contended that this decision is repugnant to the Constitution, or any law or treaty of the United States; but the argument is, that, as the check of McFreely & Hopper was not paid, it did not pay their debt. Whether this is so or not, does not depend upon any statute of the United States, but upon the principles of general law alone. We have many

times held that we have no power to review the decisions of the State courts upon such questions. *Bethel* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Ins. Co.*, 14 id. 666; *Ins. Co.* v. *Hendren*, 92 U. S. 287; *Rockhold* v. *Rockhold*, id. 130.

Writ dismissed.

MACKIE ET AL. *v.* STORY.

1. In Louisiana, a legacy to two persons, "to be divided equally between them," is a conjoint one. If but one of them survives the testator, he is entitled, by accretion, to the whole of the thing bequeathed.
2. Parol evidence, to show the intention of the testator, is not admissible.

ERROR to the Circuit Court of the United States for the District of Louisiana.

Submitted on printed arguments by *Mr. George L. Bright* for the plaintiffs in error, and by *Mr. John Finney* and *Mr. Henry C. Miller*, *contra*.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Norman Story, of the city of New Orleans, now deceased, made his will, dated April 24, 1867, the third paragraph of which was in these words: "I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them." The legatees were brothers of the deceased, and Henry died before him, leaving children; Benjamin survived. The question in this case is, whether the whole legacy accrued to Benjamin, the survivor, or whether only one half of it did so, leaving the deceased intestate as to the other half.

On the trial, the children of Henry C. Story offered parol evidence to show the good-will and affection of the deceased towards him, for the purpose of demonstrating the intention of the testator in the bequest. This evidence was properly rejected. The paper must speak for itself, and its meaning and effect be ascertained by the court.

The court below decided that the legacy was a conjoint one, and that by the right of accretion the whole of it accrued to Benjamin; and in this opinion we concur. The civil law does

not recognize the common-law distinction between joint tenancy and tenancy in common. A gift to two persons jointly, if it takes effect, inures to their equal benefit without any right of survivorship. If one dies, his share goes to his legal representatives. Hence the words "to be divided equally between them" added to such a legacy only expresses what the law would imply without them. They do not alter the character of the legacy: they are only descriptive of it. At the common law, they would have the effect of making it a tenancy in common; but they have no such effect in the civil law. The legacy, if it takes effect in respect of both legatees, will be divisible equally between them in any event.

But in testamentary dispositions, the civil law does make a distinction between a conjoint legacy and a legacy of separate and distinct shares in the thing bequeathed. Where the whole thing bequeathed is given to two persons, if one of them fails to receive the benefit of the disposition, either because he dies before the testator, or is incapable to take it, or refuses to take it, or because as to him it is revoked, the whole goes to the other legatee by accretion; for the whole was given to both, and it is presumed to be the will of the testator that he shall not die intestate as to any part, but that the whole shall pass by his will; and this, notwithstanding it may be divisible between the two legatees, if received by both. But where an aliquot part is bequeathed to one, and another aliquot part to another, then they are separate legacies, and that part which is bequeathed to one is not bequeathed to the other; as, if the testator should say, "I give one-half of my bank stock to each of my two sons," or, "I give my bank stock to my two sons, one-half to each." Here there is an assignment of parts by the testator himself; and the legacies are separate, and not conjoint.

The distinction between these forms of expression and that in the will under consideration may seem somewhat nice; but it is not more so than that which prevails in the English law between a condition annexed to the gift and one annexed to the payment or delivery of the thing given. Thus, a bequest of $100 to A when he attains twenty-one years is a conditional gift, and fails if A dies before twenty-one. But a

bequest to A of $100, to be paid to him when he attains that age, is an absolute gift, and does not fail though he dies before, the condition being annexed only to the payment.

Before the adoption of the French Civil Code, there was some difference of opinion on the subject under consideration; and this may account for the passages quoted by the plaintiffs in error from Domat. The provisions of the Civil Code on the subject were probably intended to settle the dispute. The Civil Code of Louisiana exactly follows that of France, and declares as follows: "Accretion shall take place for the benefit of the legatees in case of the legacy being made to several conjointly. The legacy shall be reputed to be made conjointly, when it is made by one and the same disposition, without the testator's having assigned the part of each co-legatee in the thing bequeathed." This language has received from the French courts and jurists abundant construction. Thus, where the disposition was as follows: "I make as my heirs general and universal Mr. Planté and his two sisters, to enjoy and dispose of my entire inheritance after my decease by equal portions," the Court of Cassation adjudged that the declaration as to parties did not apply to the gift itself, but only to the execution of it, or the mode in which the legatees were to divide it between them, and, consequently, that the right of accretion arose in reference to the part of one of the legatees who died before the testator in favor of the others. Duranton, lib. 3, tit. 2, vol. ix. (Paris ed.) art. 507. This was in 1808; and similar decisions have been made since that time by the same court. Duranton observes: "We adopt this doctrine. The assignment of equal aliquot parts to each of the legatees, as the half, the third, &c., works a division of the disposition, and makes as many legacies as there are assigned parts; but the mere declaration of equality of rights in the thing bequeathed acts only on the division, and not on the gift itself."

Many more French authorities to the same effect could be referred to; but it is unnecessary, as the Supreme Court of Louisiana has passed upon the question, and its decision is binding on us as a rule of property. In the case of *Parkinson* v. *McDonough*, 4 Martin, N. S. 246, decided in 1826, the substantive words of the bequest were the same as in the case

before us, — namely, "I bequeath to the orphan children of my old friend Godfrey Duher, Mary, Nancy, James, and Eliza, one-eighth of all my property, to be equally divided among them;" and the decision was, that the legacy was conjoint, and consequently, that the portion of one of the legatees who died before the testator went by accretion to the survivors. The court say, "The distinction between a bequest of a thing to many in equal portions, and one wherein a testator gives a legacy to two or more individuals, to be divided in equal portions, appears at first view extremely subtle and refined. The difference of phraseology in those two modes of bequeathing is so slight, as not readily to convey to the mind any difference in ideas, and can only produce this effect by separating the members of the sentence in the latter phrase; in truth, to create two distinct sentences, each complete in itself with regard to sense and meaning, — the one relating to the disposition of the will, the other to its execution. We might hesitate much in adopting this method of construction, were it not sanctioned by the authorities cited in behalf of the appellants: the doctrine contended for is fully supported by the commentary of Touillier on the 1044th article of Code Napoleon, which we have already shown to be precisely similar to that of our own code on the same subject."

This decision was followed by the same court in 1855, in the case of *Lebeau* v. *Trudeau*, 10 La. Ann. 164, which was even a stronger case in favor of assignment of separate parts than that of *Parkinson* v. *McDonough*, the words of the bequest being, "After my debts are paid, my property shall be divided in equal proportions among the persons hereinafter named." After naming the legatees, the testator says, "I have hereinbefore mentioned the names of the persons to whom I bequeath all my property." After a full discussion of the question, it was decided that the legacy was conjoint, and that accretion took place. The court uses the following language: "The assigning of the parts of each co-legatee means something more than is comprehended in the language of this will, which, according to my understanding of it, simply directs their participation of his whole estate in equal portions. I apprehend the terms used in the Code contemplate an express specification and assignment

of the respective portions of the legatees, calling each to his particular part. But in the present case, there is not that specific and distinct assignment of the parts which in my judgment is necessary to constitute a distinct legacy to each, of a distinct portion of the deceased's fortune. He appears to me, on the contrary, to have called them conjointly to partake equally in the totality of his estate, and has mentioned the equality of their portions for the purpose of regulating the distribution of that totality. They are conjointly his universal legatees."

In view of these decisions, we cannot hesitate to decide that the legacy in question is a conjoint legacy, and that the right of accretion took place in favor of the defendant in error.

Judgment affirmed.

BOND ET AL. v. MOORE.

The order of the President of the United States of April 29, 1865 (13 Stat. 776), removed, from that date, all restrictions upon commercial intercourse between Tennessee and New Orleans; and neither the rights nor the duties of the holder of a bill of exchange, drawn at Trenton, Tenn., which matured in New Orleans before June 13, 1865, were dependent upon, or affected by, the President's proclamation of the latter date (id. 763).

ERROR to the Supreme Court of the State of Tennessee.

This is an action commenced in the Circuit Court of Haywood County, Tenn., against the defendant in error as indorser of a bill of exchange drawn at Trenton, Tenn., Feb. 13, 1862, upon a firm in New Orleans, La., and payable four months after date. The bill was not presented in New Orleans until June 20, 1865, when, payment being refused, the plaintiff caused it to be protested.

In their declaration the plaintiffs averred that the earlier presentation of the bill in New Orleans was prevented by the obstructions of war, and the interruption of intercourse between their place of residence and that of the drawees.

Among other defences the defendant interposed a plea that the bill was not presented within a reasonable time after the removal of such alleged obstructions.

The plaintiffs asked the court to charge the jury that the bill of exchange could not have been legally presented for payment until after the 13th June, 1865, the date of the proclamation of President Johnson restoring Tennessee to commercial relations with the United States; that if the jury find that, after that date, the plaintiffs exercised reasonable diligence to have the bill presented to the drawees, and did so present it, and demand payment, which was refused, and that thereupon the same was protested for non-payment, and notice thereof given to the indorser, — they must find for the plaintiffs.

The court refused so to charge, but charged in substance that the impediment of non-intercourse between the State of Tennessee and the city of New Orleans — an impediment interposed by the existence of the war of the rebellion, and during which the necessity of presenting the bill for payment was suspended — was removed and ceased to exist when there was an actual cessation of hostilities; and that the time when this actual cessation occurred was a question to be decided by the jury from the proof before them.

There was a verdict for the defendant. The judgment thereon was affirmed by the Supreme Court of the State; whereupon the case was brought here.

Mr. Edward J. Read for the plaintiffs in error.
Mr. Richard T. Merrick, contra.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The only question in this record which we are asked to consider is as to the effect of the President's proclamation of June 13, 1865, 13 Stat. 763, upon the rights and duties of parties to commercial paper, residing respectively during the late civil war in Tennessee and New Orleans, when the paper matured after the occupation of New Orleans by the national forces and before the date of that proclamation. This, under our ruling in *Matthews* v. *McStea*, 20 Wall. 649, is a Federal question.

On the part of the plaintiffs in error, it is contended that the holders of such paper could not lawfully take steps to charge the parties by demand and notice until the proclamation was

made, because up to that time the war existed as a fact, and the parties occupied towards each other the relation of public enemies. All restrictions upon commercial intercourse between Tennessee and New Orleans were removed by an executive order published April 29, 1865, 13 Stat. 776, which was followed by an executive proclamation of similar purport under date of May 22, 1865, id. 757, so that while the war existed as a political fact until June 13, the date of the official announcement of its close, business intercourse between the citizens of the two places was allowed after April 29. Bond, therefore, as the holder of the bill upon which this suit is brought, might properly have demanded its payment by the drawee in New Orleans, and notified his indorser in Tennessee of the non-payment at any time after that date. Neither his rights nor his duties in this particular were in any manner dependent upon or affected by the proclamation of June 13. We have already decided to the same effect in *Masterson* v. *Howard*, 18 Wall. 105, and *Matthews* v. *McStea*, 91 U. S. 7.

Judgment affirmed.

WEST WISCONSIN RAILWAY COMPANY *v.* BOARD OF SUPERVISORS OF TREMPEALEAU COUNTY.

The doctrine announced in *Tucker* v. *Ferguson*, 22 Wall. 527, — that an act of the legislature of a State, exempting property of a railroad company from taxation, is not, when a mere gratuity on the part of the State, a contract to continue such exemption, but is always subject to modification and repeal in like manner as other legislation, — reaffirmed, and applied to this case.

ERROR to the Supreme Court of the State of Wisconsin.

Argued by *Mr. P. L. Spooner* and *Mr. Matt. H. Carpenter* for the plaintiff in error, and by *Mr. S. U. Pinney* for the defendants in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The facts of this case are substantially the same with those of *Tucker* v. *Ferguson*, 22 Wall. 527, and the question presented for our determination does not vary materially from the one there decided.

The United States granted certain lands to the State of Wisconsin to aid in the construction of railroads in that State. The State transferred a portion of the lands to the plaintiff in error for the purpose and upon the terms and conditions specified by Congress.

Patents for designated quantities of the land were to issue to the company as successive sections of the road of twenty miles each were completed. In the mean time, the title of the company was inchoate. On the 2d of April, 1864, the legislature of Wisconsin passed an act, whereby, in the first section, it was declared that all the lands in question the title whereto should become vested in the company should be exempt from taxation for ten years from the passage of the act. The second section declared that such lands should become subject to taxation as soon as they were sold, leased, or conveyed by the company. The last clause of this section is as follows: "Provided that said lands may be mortgaged for the purpose of raising funds to build said railroad without being subject to taxation for the time aforesaid."

In August, 1868, the company executed a mortgage of its roadway and rolling-stock, and of all the lands it might thereafter acquire, as security for its bonds, to the amount of $4,000,000, maturing at different times. By another act, of the 16th of March, 1870, the exemption from taxation was further extended for ten years. But it was declared: "And it is further provided, and this act is upon the express condition that if said railroad company shall not have built their said road within two years from the passage of this act, then, and in that case, this act shall be null and void: provided, that this act shall not apply to Pierce County."

The bonds secured by the deed of trust were issued in successive series, in the years 1868, 1870, 1871, and 1872. The company realized from the four millions of bonds about $3,200,000, and applied the amount received to the construction of their road. A part of the road was completed in 1868, forty-five miles in 1870, and the entire line during the month of November, 1871. By an act of the legislature of March 15, 1871, it was enacted that the lands in Trempealeau County belonging to any railroad company "not used for road-bed or dépôt purposes shall

be liable to taxation the same as other real estate." By an act of March 24, 1871, the exemption act of March 16, 1870, was amended so that it should not apply to Trempealeau County. The tax in question was levied in 1871, and the sale for its non-payment complained of was made in 1872. The exemption created by the act of 1864 was to terminate in 1874. That specified in the act of 1870 was then to commence.

The plaintiff in error insists that these acts — the lands of the company having been mortgaged pursuant to the first, and the road having been completed within the time limited by the second — created a contract within the contract clause of the Constitution of the United States, and that, therefore, the two acts of 1870 abrogating the exemptions were void.

In the argument here, a large share of the discussion was devoted to sect. 1, art. 2, of the constitution of Wisconsin. In our view, it is unnecessary to consider that branch of the case, and it will not be further adverted to.

One who has examined this case cannot look through *Tucker* v. *Ferguson*, as reported, without being struck with the similarity of the points and arguments, as well as the substantial identity of the facts, in the two cases. The latter case was carefully considered in all its aspects by this court. It is unnecessary to reproduce at length the views then expressed. In that case, 22 Wall. 575, we said: —

"The taxing power is vital to the functions of government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all."

We hold here, as we held there, that the exemptions in question were gratuities offered by the State, without any element of a contract. There was no assurance or intimation

that they were intended to be irrevocable, or that the laws in question should not be at all times subject to modification or repeal in like manner as other legislation. If a different intent had existed, it would doubtless have been clearly manifested by the language employed. It would not have been left to encounter the possible results of such a struggle and conflict as have occurred in this litigation.

The State asked for no promise from the company, and the company gave none. It was optional with the company to mortgage its lands or not, and to complete or not to complete the road within two years. The early completion of the road was beneficial to the company as well as to the public. Until then, there could be no income, and there was a constant loss of interest. Every step of progress added to the value of the lands of the company through which the road was to pass.

Each party was at liberty to take its own course. If the company came within the condition specified in the act of 1870, it would be in a position to take the gratuity offered by that act. If this were so, the State might continue or withdraw that gratuity when it took effect, as it might deem best for the public welfare; and it possessed the same power with reference to the exemption created by the prior act of 1864, while that act was operative. Neither party was, nor was intended to be, in any wise bound to the other. The State was at all times wholly unfettered as to both exemptions. The company chose to bring itself within the condition of the act of 1870. The State chose to continue the gratuity for a time, and then withdrew it. The exemption given by both acts was abrogated a year before the bonds of the last series were issued, and before the first term of exemption expired or the second began. The State did what it had an unqualified right to do. In such cases, a reasonable doubt is fatal to the claim. *Prima facie* every presumption is against it. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported. *Providence Bank* v. *Billings*, 4 Pet. 561; *Christ's Church* v. *Philadelphia*, 24 How. 302; *Gilman* v. *Sheboygan*, 2 Black, 513; *Herrick* v. *Randolph*, 13 Vt. 531; *Easton Bank* v. *Commonwealth*, 10 Penn. St. 450; *People* v. *Roper*, 35 N. Y. 629.

We hold the conclusion we have announced to be the law of this case. With its ethics we have nothing to do. That subject is not open to our consideration.

Judgment affirmed.

MR. JUSTICE DAVIS did not sit in this case.

BADGER ET AL. *v.* UNITED STATES EX REL. BOLLES.

A supervisor, town-clerk, or justice of the peace, although his resignation is tendered to and accepted by the proper authority, continues in office, and is not relieved from his duties and responsibilities as a member of the board of auditors, under the township organization laws of the State of Illinois, until his successor is appointed, or chosen and qualified.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

On the seventh day of January, 1875, the relators filed in the Circuit Court for the Northern District of Illinois their petition for a writ of *mandamus* against the plaintiffs in error, alleging that, on May 7, 1874, they recovered, in said court, two judgments at law against the town of Amboy, a municipal corporation under the township organization laws of the State of Illinois; that the supervisor, town-clerk, and justices of the peace of the town constituted a board of auditors, not less than three being a quorum, whose duty it was to convene on the Tuesday preceding the second Tuesday of September, and on the Tuesday preceding the first Tuesday in April, in each year, to examine and audit town accounts; that on the 29th of August, 1874, said board of auditors consisted of Chester Badger, the supervisor, Charles E. Ives, the town-clerk, Lee Cronkrite, Oliver F. Warrener, Simon Badger, and William B. Andrus, justices of the peace of said town; that the relators on that day presented to said board a sworn statement that the judgments were just and unpaid, and should be audited and allowed; they also at the same time delivered to, and filed with, the clerk of the said town, a certified copy of said judgments, which the board neglected and refused to audit, and has refused ever since; that Chester Badger, Ives, Warrener, and Andrus pretended to

resign their offices, and would not discharge the duties thereof, but that no other person had been elected or appointed to succeed them; that the other two justices, Simon Badger and Cronkrite, to defeat the collection of said judgments, refused to act as such auditors, or meet and associate with the collector and assessor of said town to constitute a board of auditors, nor would they by appointment fill said alleged vacancies; that the acts of the parties aforesaid were to hinder and delay the collection of the judgments; that, by reason of their said acts, relators have been unable to obtain the necessary levy and collection of taxes to pay said judgments, and that no provision has been made for the payment thereof by the said town. Relators pray for summons to award a *mandamus* against said parties, to compel them to audit said judgments.

The respondents filed their answer on the 2d of February, 1875. They admit that on the 29th of August, 1874, Chester Badger, supervisor, and Warrener and Andrus, justices of the peace, resigned their respective offices, and that on the 31st of the same month Ives, town-clerk, also resigned. That, pursuant to the provisions of sect. 4, art. 10, of the township organization act of Illinois, Revised Laws 1874, p. 1079, said resignations were made to and accepted by Cronkrite and Simon Badger, justices of the town, who forthwith gave notice to the town-clerk of the resignation of Chester Badger, Andrus, and Warrener, and said clerk made a minute thereof upon the records of said town before he resigned his office. That the resignation of Ives, the town-clerk, was likewise duly accepted, on the said thirty-first day of August, by said justices, and notice thereof entered upon the town records. Respondents insist that their resignations were tendered and accepted in good faith, and that thereby they ceased to be town officers. They admit that no successors have been elected or appointed, and that the remaining two justices of the peace will not act as town auditors, or associate with the collector and assessor of said town, nor have they filled said vacancies by appointment.

The relators demurred to the answer; which demurrer being sustained, and the respondents electing to stand by their answer, the court gave judgment in favor of the relators, and ordered a

peremptory *mandamus* to issue as prayed for in their petition. The respondents thereupon sued out this writ.

Submitted on printed arguments by *Mr. Thomas J. Henderson* for the plaintiffs in error, and by *Mr. George O. Ide, contra.*

MR. JUSTICE HUNT delivered the opinion of the court.

No part of the answer in our judgment requires consideration, except that which raises the point of the legality of the resignation of the parties named. If they had ceased to be officers of the town when the *mandamus* was issued, there may be difficulty in maintaining the order awarding a peremptory *mandamus* against them. If they were then such officers, the case presents no difficulty.

The alleged resignations of the supervisor and town-clerk were accepted by the justices of the town; but their successors had not been qualified, nor, indeed, had they been chosen when the petition was filed. Does a supervisor, town-clerk, or justice of the peace of the State of Illinois cease to be an officer when his resignation is tendered to and accepted by a justice of the peace, or does he continue in office until his successor is chosen and qualified?

By the common law, as well as by the statutes of the United States, and the laws of most of the States, when the term of office to which one is elected or appointed expires, his power to perform its duties ceases. *People* v. *Tilman*, 8 Abb. Pr. 359; 30 Barb. 193. This is the general rule.

The term of office of a district attorney of the United States is fixed by statute at four years. When this four years comes round, his right or power to perform the duties of the office is at an end, as completely as if he had never held the office. Rev. Stat. sect. 769. A judge of the Court of Appeals of the State of New York, or a justice of the Supreme Court, is elected for a term of fourteen years, and takes his seat on the first day of January following his election. When the 14th of January thereafter is reached, he ceases to be a judicial officer, and can perform no one duty pertaining to the office. Whether a successor has been elected, or whether he has qualified, does not enter into the question. As to certain town officers, the rule is different. 1 Rev. Stat. (N. Y.) 340, sect. 30.

The system of the State of Illinois seems to be organized upon a different principle. Thus, the Supreme Court consists of seven judges, who are required to possess certain qualifications of age and of residence, and who are elected for the term of nine years (Code of Illinois, 1874, pp. 69, 70), at which time it is provided that the "term of office shall expire."

Circuit judges in like manner are elected for a term of six years. Id. p. 701. County judges and county clerks, probate judges and State's attorneys, are elected for the term of four years. Id. pp. 71, 72.

As to all of these officers, including judges, it is provided in the constitution of Illinois that "they shall hold their offices until their successors shall be qualified." Id. p. 73, sect. 32. They may thus hold their offices much longer than the term for which they are elected.

The provisions as to town officers are of the same character. It is enacted (art. 7, sect. 61, p. 1075) that, at the town meeting in April of each year, there shall be elected in each town one supervisor and one town-clerk, who shall hold their offices for one year, and until their successors are elected and qualified, and such justices of the peace as are provided by law.

Of justices of the peace, it is enacted that there shall be elected in each town not less than two nor more than five (depending upon the population of the town), who shall hold their offices "for four years, or until their successors are elected and qualified." p. 637, sect. 1.

The qualifying so often spoken of is defined as to town officers by art. 9, sect. 85: —

"Qualifying. Every person elected or appointed to the office of supervisor, town-clerk, &c., before he enters upon the duties of his office, and within ten days after he shall be notified of his election or appointment, shall take and subscribe, before some justice of the peace or town-clerk, the oath or affirmation of office prescribed by the constitution, which shall, within eight days thereafter, be filed in the office of the town-clerk."

Thus far it would seem plain that the office of a supervisor or town-clerk could not be terminated until his successor subscribed and filed his oath of office, and that when the super-

visor and town-clerk before us supposed that their offices were at an end by their resignations, they were in error.

There are two other provisions, which, it is supposed, have some bearing upon the point we are considering. Sect. 97 (p. 1079) provides that whenever a vacancy occurs in a town office by death, resignation, removal from the town, or other cause, the justices may make an appointment which shall continue during the unexpired term, and until others are elected or appointed in their places. By sect. 100, the justices of the town may, for sufficient cause shown to them, accept the resignation of any town officer, and notice thereof shall immediately be given to the town-clerk.

A similar provision as to the elective officers of a higher grade is found in the statutes. By c. 46, sect. 124 *et seq.* (p. 466), it is provided that resignations of elective offices may be made to the officer authorized to fill the vacancy or to order an election to fill it, and the various events which may cause a vacancy are defined. Governors, judges, clerks of courts, &c., are specifically referred to.

The provision as to these officers and as to the town offices are parts of the same system. The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor.

Sect. 92 (p. 1078) is also referred to: "Town officers, except as otherwise provided, shall hold their offices for one year, and until others are elected or appointed in their places and are qualified." The term "otherwise provided" has reference to the original term fixed by law, and not to resignations or vacancies. Thus, justices hold for four years, supervisors and constables for one year; and should there be created or found to exist a town officer, and no provision be made as to the duration of his office, this section is intended to meet the case by fixing one year as such term. It has nothing to do with the case before us, further than it reiterates the rule

everywhere found in the statutes of Illinois, that such person shall serve not only for one year, but until his successor shall qualify.

People ex rel. Williamson v. *McHenry*, 52 N. Y. 374, was the case of a *quo warranto* to test the title to the office of collector of the town of Flatbush, Kings County, N. Y. The defendant was elected such collector on the fifth day of April, 1870. On the fourth day of April, 1871, the relator was elected collector of the same town, but did not take or file an oath of office or execute the bond to the supervisors of the town. The board of supervisors recognized the defendant as the legal collector, and delivered to him the warrant for the collection of the taxes of 1871. To settle the dispute, the relator brought the suit referred to. The attempt of the defendant to sustain himself under an act of the legislature, extending the term of office of the collector of Kings County to three years, failed. The court held the act to be unconstitutional as to existing collectors. The defendant, however, succeeded in retaining the office, and had judgment that he was the legal collector; for the reason, that, although the relator was legally elected, he had failed to take the oath of office. The statute of New York as to town officers was in substance the same as that of the State of Illinois. It was as follows: "Town officers shall hold their offices for one year, and until others are chosen or appointed in their places, and have qualified."

In 6 Bissell, 308, is found the opinion of Judge Blodgett in the case we have before us. He holds that a resignation does not relieve a supervisor or town-clerk from the responsibilities of his office until a successor is appointed. We think such is the law.

In *People* v. *Hopson*, 1 Den. 574, and in *People* v. *Nostrand*, 46 N. Y. 382, it was said, that when a person sets up a title to property by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer *de facto*, that he merely acts in the office; but he must be an officer *de jure*, and have a right to act. So, we think, where a person being in an office seeks to prevent the performance of its duties to a creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto*, but

de jure; that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor will not be helped out by the aid of the courts. *Judgment affirmed.*

DESMARE v. UNITED STATES.

1. A domicile once existing continues until another is acquired; and, where a change thereof is alleged, the burden of proof rests upon the party making the allegation.
2. A., whose domicile was, and continued during the war to be, at New Orleans, went into or remained within the territory embraced by the rebel lines, engaged actively in the service of the rebel government, and, while so engaged, purchased certain cotton, which, upon the subsequent occupation of that territory by the military forces of the United States, was seized, sold, and the proceeds paid into the treasury. *Held*, that his purchase of the cotton was illegal and void, and gave him no title thereto.
3. *Mitchell* v. *United States*, 21 Wall. 350, reaffirmed, and applied to this case.

APPEAL from the Court of Claims.

On the 26th of June, 1867, Alphonse Desmare, of New Orleans, La., filed his petition in the Court of Claims to recover the value of five hundred and fifty-six bales of cotton, alleging that, in the year 1863, he was the owner of that number of bales, then at Opelousas, in the parish of St. Landry, La.; that, in April, 1863, said cotton was taken and captured by officers of the United States army, by whom, under the orders of General N. P. Banks, commanding the Department of the Gulf, it was shipped to New Orleans, sold, and the proceeds placed in the treasury of the United States.

The court below found, as matters of fact, —

1. The claimant, before the war, had his domicile in the city of New Orleans, La., where he resided, and was a partner with one Laforest, under the style of Laforest & Desmare, commission-merchants, and he was residing there also on the 19th of January, 1866. There is no evidence of any change of said domicile, or of a dissolution of said partnership; nor is there any evidence as to where the claimant was on the 27th of April, 1862, when the United States military forces took possession of New Orleans, or before that date, during the war, or

afterward, until October, 1862, when it is proved he was in the parish of St. Landry, La., purchasing the cotton, which is the subject of this action, and acting as agent of the rebel government for the exchange of Confederate bonds for Confederate notes, for which latter purpose he had an office at Opelousas, in said parish. Said parish was within the rebel lines until April, 1863, when it was taken possession of by United States forces under General Banks.

2. Between the 1st of October, 1862, and the month of April, 1863, the claimant, in person, purchased within said parish, of different persons, two hundred and sixty-eight bales of cotton, and paid for the same in Confederate money. All of said cotton was seized by officers of the United States upon the entry of their military forces into said parish, was turned over to agents of the Treasury Department, sold, and the net proceeds, to the aggregate amount of $51,456, are now in the United States treasury.

3. Said claimant and one Dupré, jointly and personally, purchased within said parish, March 3, 1863, eighty-four bales of cotton, for which they gave their notes, with security. These notes were paid after the war, one-half by the claimant and one-half by said Dupré. This cotton was seized by officers of the United States in April, 1863; was turned over to treasury agent and sold, and the net proceeds thereof, to the amount of $16,128, are in the United States treasury.

4. The claimant has failed to prove that any other cotton owned by him was seized by officers or agents of the defendants.

The court thereupon concluded, as matters of law, —

1. The claimant's domicile, found to have been in the city of New Orleans before the war, and not proved to have been changed, is presumed to have continued and been in that city when the purchases of cotton were made by him within the rebel lines, as set forth in the findings.

2. The claimant's domicile being in the city of New Orleans, he is presumed to have been there personally until he is proved to be elsewhere; and the claimant, not showing that he was absent from the place of his domicile when the city was captured, April 27, 1862, it is presumed he was there at that time,

and subsequently crossed the Federal lines about the time he is proved to be in the parish of St. Landry.

8. The purchases of cotton by the claimant, under the circumstances set forth in the findings, were void as against the law and public policy of the United States, and he acquired no title to the cotton thereby.

The plaintiff's petition having been dismissed, he appealed to this court.

Mr. Thomas J. Durant and *Mr. C. W. Hornor*, for the appellant.

Because the claimant's domicile was in the city of New Orleans before the war, and was not shown by proof to have been changed, the presumption of the court below, that his domicile continued and was "in that city when the purchases of cotton were made by him within the rebel lines," &c., is contrary to both the facts and the law. He had his domicile in the parish of St. Landry when he bought the cotton there. It being established that before the war he was a rebel, and still one on Jan. 19, 1866, it is a presumption of law, that during all the intermediate time he remained one.

Probatis extremis præsumuntur media. Domicile is a question both of law and fact. Claimant was, in October, 1862, in the parish of St. Landry, "purchasing cotton, and acting as agent of the rebel government." As such an officer, it is undeniable he could have no domicile within the Union lines. The voluntary residence of the petitioner in New Orleans after the war began would have been a crime, and statute evidence of it.

The moment he took the oath and assumed the duties of an agent of the Confederate government in St. Landry, his domicile, both political and civil, in that parish, became fixed *eo instanti.*

This is a *presumptio juris et de jure.* It is as conclusive as the bar of a statute of limitation, or the estoppel by an adjudication of a matter in a court of competent jurisdiction. No court will allow the contrary proof to be made. In the case of a public officer, neither the fact nor the intent of a domicile elsewhere could prevail over this presumption, which differs radically from the presumptions of the court below. 1 Evans's

Pothier, 414; La. Code, 1870, art. 45; Phillimore on Domicile, 61; *Murray* v. *Charming Betsy*, 2 Cranch, 64; *The Venus*, 8 id. 280 *et seq.*; *The Frances*, id. 363; Merlin, Rep., *verbo* Domicile; Boileux Commentaries Code Nap., vol. i. p. 220, on Code Nap. art. 107.

It cannot be doubted that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. *The Vrow Anna Catharina*, 5 Rob. A. 167.

The petitioner was involved in the universal disloyalty of the South from the beginning of the war up to 19th January, 1866, and had his domicile, political and civil, in rebel territory during all that time, except for the interval between April 27 and October, 1862. In the absence of any proof of the fact that he was domiciled in New Orleans during this period, the lower court presumes, because he was there domiciled before the war; and, because this domicile was not proved to have been changed, it must be presumed to have continued; and hence he was domiciled in New Orleans when the purchases were made by him within the rebel lines.

Such a presumption is certainly not applicable to the exceptional state of war. In a prize court, it cannot be doubted that in an investigation into the legality or illegality of a trade carried on in an alleged violation of the laws of war, and where the proceedings were *in rem* against cotton, as in this case, Desmare's domicile would not be found to be under the flag of the Union. Politically, he would be decreed a Confederate by the courts of the Confederate States; and the idea that the Confederacy could have confiscated this cotton before its capture by the United States forces, on the ground that he was presumably a loyal man, because he had crossed the lines from New Orleans, and had renewed his allegiance to the Union, is purely illusory. And yet this result flows as naturally from the facts found as the legal conclusions drawn by the court below; and both are contradictory and untrue.

The question is, what is the political, rather than what is the civil, domicile of the claimant when residing in St Landry parish. The simple test, did he abandon the Union and cast his lot with the rebels, if applied in this case, would be quite con-

clusive. His acts and doings manifest a clear intent in him *quatenus in illo exuere patriam.* *Whicker* v. *Hume*, 7 H. L. C. 159; *Moorhouse* v. *Lord*, 10 id. 282; *Holdane* v. *Eckford*, L. R. 8 Eq. 631; Woolsey's Intern. Law, § 168.

For the purpose of capture, property found in enemy territory is enemy property, without regard to the *status* of the owner. In war, all residents of enemy country are enemies. The time is not so essential as the intent. *Lamar, Executor*, v. *Brown et al.*, 92 U. S. 187; *Scholefield* v. *Eichelberger*, 7 Pet. 593; *Johnson* v. *Merchandise*, 6 Hall's Am. L. I. 68; *United States* v. *Penelope*, 2 Pet. Adm. 438.

The Court of Claims first presumes, that New Orleans being Desmare's domicile prior to his capture, he remained so domiciled afterwards; and from this presumption draws a consequent presumption, that he must have crossed the line to buy the cotton. But no presumption can be safely drawn from a presumption. *Douglass* v. *Mitchell's Executor*, 35 Penn. 440.

War made all the inhabitants of Louisiana enemies of the Union. To this rule there were no exceptions in law, and few in fact. As fast as the territory was reconquered, its inhabitants did not legally become loyal, and vested with the capacity to stand in judgment in the Court of Claims, or any other national court. Until pardoned, and their allegiance was renewed, they were enemies. The essential elements of illegal traffic in time of war are: 1st, That it takes place between members of the two nations respectively in hostility to each other; 2d, That it counteracts the operations of war. 1 Kent, 66. Both of these elements must concur. *Griswold* v. *Waddington*, 15 Johns. 57; *United States* v. *Grossmayer*, 9 Wall. 72; *Montgomery* v. *United States*, 15 id. 395; *Coppell* v. *Hall*, 7 id. 542; *United States* v. *Lapène*, 17 id. 601; *Mitchell* v. *United States*, 21 id. 350.

Neither of these elements is involved in this case.

Mr. Solicitor-General Phillips, contra.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The judgment of this court in *Mitchell* v. *United States*, 21 Wall. 350, is decisive of this case. It is unnecessary to repeat what was there said. The subject of domicile in some of its

aspects was carefully considered. We shall avail ourselves of its rulings without again specially referring to it. The findings of the Court of Claims furnish the facts we are to consider, and we cannot look beyond them. For the purposes of this case they import absolute verity and conclude both parties.

Before the breaking out of the late civil war, the appellant was domiciled in the city of New Orleans. He was a member of a commercial partnership there. There is no proof of any change of domicile subsequently. A domicile once existing continues until another is acquired. A person cannot be without a legal domicile somewhere. Where a change of domicile is alleged, the burden of proof rests upon the party making the allegation.

The cotton covered by the claim in the present case was all purchased by the appellant in the parish of St. Landry, in the State of Louisiana, between the 1st of October, 1862, and the 1st of April, 1863. That territory was then within the rebel lines. The appellant was there acting as the agent of the rebel government in exchanging its bonds for Confederate notes. His office, as such agent, was at Opelousas, in that parish.

On the 6th of April, 1862, Admiral Farragut reached New Orleans with his fleet. On the following day he demanded of the mayor the surrender of the city. No resistance was offered. On the 1st of May transports conveying the troops of General Butler arrived. On the following day their landing was completed. The military occupation of the city by the United States then began, and it continued without interruption down to the close of the war. On the 6th of May the commanding general issued a proclamation (prepared and dated on the 1st), whereby it was declared that "all rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." The non-intercourse act of July 13, 1861 (12 Stat. 257), and the President's proclamations of the 16th of August, 1861 (12 Stat. 1262), of the 12th of May, 1862 (12 Stat. 1262), and of the 2d of April, 1863 (13 Stat. 731), need not be particularly adverted to. They have been so often considered by this court in previous cases, that the public and the profession are familiar with them. The parish of St. Landry

was also subjugated by the arms of the United States in April, 1863. The cotton in question was thereupon seized, and subsequently sold, and the proceeds paid into the treasury of the United States, where they remain. Those proceeds are the subject of this litigation.

Upon the issuing of General Butler's proclamation, the legal *status* of New Orleans and its inhabitants, with respect to the United States, became changed. Before that time the former was enemies' territory and the latter were enemies, in all respects as if the pending strife had been a public war between the United States and a foreign belligerent, and the city had been a part of the country of the enemy, although the conflict was, in fact, only a domestic insurrection of large proportions. The city was blockaded; and the property of its inhabitants, wherever found at sea, was seized, condemned, and confiscated as prize of war. General Butler's proclamation was proof of the subjugation of the city and the re-establishment of the national authority. The hostile character of the territory thereupon ceased, and the process of rehabilitation began. The inhabitants were at once permitted to resume, under the regulations prescribed, their wonted commerce with other places, as if the State had not belonged to the rebel organization. *The Venice*, 2 Wall. 258. But they were clothed with new duties as well as new rights. It was a corollary from the new condition of things, that they should obey the inhibition of trade with the localities still under the ban of the President's proclamation of the 16th of August, 1861. In this respect they were on the same footing with the inhabitants of the loyal States, abiding in such States, and with the citizens of such States, and foreigners then sojourning in New Orleans. It was not a penal infliction, but was intended for the benefit of the nation in the prosecution of the war. It was a burden incident to the effort the government was making to put down the insurrection. It was the plain duty of the appellant to obey the injunction. Instead of doing so, while his domicile, in the view of the law, was and continued to be at New Orleans, he went or remained within the rebel lines, engaged actively in the service of the rebel government, and was so engaged when and where, as he alleges, he acquired the ownership of the cotton in question.

His contracts for the cotton were clearly illegal and void, and gave him no title. Such has been the ruling of this court in an unbroken series of adjudications. *Coppel* v. *Hall*, 7 Wall. 548; *United States* v. *Lane*, 8 id. 185; *United States* v. *Grossmeyer*, 9 id. 72; *United States* v. *Montgomery*, 15 id. 395; *United States* v. *Lapine*, 17 id. 602; *Mitchell* v. *United States*, 21 id. 350.

The result is the same as if the purchases had been made by an agent of the appellant, sent by him from New Orleans, instead of having been made by himself in person.

To hold otherwise would give a premium to a law-breaker, and involve the anomaly of conceding to the offender rights and immunities denied to all the citizens of the loyal States.

Judgment affirmed.

CITY OF WINONA v. COWDREY.

The contract between the city of Winona and the Minnesota Railway Construction Company, bearing date April 23, 1870, construed, and the rights of the respective parties thereto discussed.

ERROR to the Circuit Court of the United States for the District of Minnesota.

This was an action against the city of Winona upon certain coupons attached to bonds, referred to in a contract between the city and the Minnesota Railway Construction Company, which is as follows: —

"This agreement, made this twenty-third day of April, 1870, by and between the city of Winona, of the State of Minnesota, and the Minnesota Railway Construction Company, a corporation organized under the laws of the State of Minnesota, and now engaged in the construction of the St. Paul and Chicago Railway, witnesseth: —

"That whereas the building of a railroad from St. Paul to Winona is of great public utility and benefit, and a public improvement, which, it is believed, would be particularly beneficial and advantageous to the city of Winona; and whereas said St. Paul and Chicago Railway will connect, by bridge or ferry, at Winona with the La Crosse, Trempealeau, and Prescott Railroad, now being constructed, and will, when both railroads are completed, open and fur-

nish an unbroken line of travel by railroads through Winona, between St. Paul and Milwaukee and Chicago, which also is considered especially beneficial and advantageous to the city of Winona; and whereas, in view of the premises, and as an inducement and part compensation to the Minnesota Railway Construction Company, the city of Winona is willing and proposes to issue and deliver to the said construction company its bonds to the nominal amount of $100,000, to aid in the building of said railroad from St. Paul to Winona, and, for the purpose of thus securing a line of travel by railroad between the East and the West through said city, as aforesaid, the city of Winona, in consideration of the premises, hereby agrees, the Minnesota Railway Construction Company keeping and performing their agreement as herein set forth, to make, sign, seal, and deliver, for the use and benefit of the said Minnesota Railway Construction Company, its obligations or bonds, in sums of $1,000 each, to the aggregate amount of $100,000, obligating the said city to pay the amount specified therein to Russell Sage and others, of the city and State of New York, or to the bearer, in twenty years from the first day of January, A.D. 1871, — viz., on the first day of January, A.D. 1891, — in the city of New York, with interest at the rate of six per cent per annum; the interest to be paid semi-annually, on the first day of January and July of each year, in the city of New York; and to deposit said bonds with the First National Bank of St. Paul, in the State of Minnesota, to be held by said depositary in escrow or in trust, to be delivered as hereinafter provided.

"The Minnesota Railway Construction Company hereby, on their part, the city of Winona keeping and performing its agreement as herein contained, agree: —

"*First*, To either, in their own name or that of their successors or assigns, or in the name of the St. Paul and Chicago Railway Company, build and equip a good and substantial railway from the city of St. Paul to the city of Winona (excepting a bridge across the Mississippi River at Hastings), and put it into operation within three years from this date, and to connect at Winona, by bridge or ferry, with the La Crosse, Trempealeau, and Prescott Railroad.

"*Second*, That said part of raid railway, between a point on the Winona and St. Peter Railroad at or near Minnesota City, in Winona County, and the village of Minneiska, in Wabasha County, shall be built, equipped, and put into operation within one year from this date.

"*Third*, That the La Crosse, Trempealeau, and Prescott Railroad, from its terminus opposite Winona, as now located and fixed

(which terminus shall not be changed without the consent of the city of Winona), to a point on the Milwaukee and St. Paul Railway east of North La Crosse, shall be built, equipped, and put into operation within the year 1870.

"It is further agreed, by and between the parties hereto, that the said bonds are to be, in form, plain unconditional obligations, and substantially of the form and tenor of schedule A, hereto annexed, and are to be executed as soon as practicable, and placed in the custody of said depositary, to be delivered as hereinafter provided.

"It is further agreed, as to the delivery of said bonds, as follows: —

"*First*, That if the said La Crosse, Trempealeau, and Prescott Railroad is not built, equipped, and put into operation, as aforesaid, between the points aforesaid, within the year 1870, then, and in that event, the said bonds and coupons shall be by said depositary returned to the city of Winona, or to its legally authorized agent.

"*Second*, That if a railroad from a point on the Winona and St. Peter Railroad, at or near Minnesota City, in Winona County, to Minneiska, in Wabasha County, is not built, equipped, and put into operation, as aforesaid, within one year from this date, then, and in that event, said bonds and coupons shall be by said depositary returned to said city of Winona or its legally authorized agent.

"*Third*, That if a railroad is not built, equipped, and put into operation from St. Paul to Winona (except the bridge at Hastings), as aforesaid, connecting at Winona, by bridge or ferry, with the La Crosse, Trempealeau, and Prescott Railroad within three years from this date, then, and in that event, the said bonds and coupons shall be by said depositary returned to said city of Winona, or to its legally authorized agent; but in no case shall the said bonds, or any part thereof, be delivered by said depositary to the said Minnesota Railway Construction Company until a truss railroad bridge is constructed across the Mississippi River, at Winona, connecting the said St. Paul and Chicago Railway, or the Winona and St. Peter Railroad, with the La Crosse, Trempealeau, and Prescott Railroad, at the present terminus of the last-named railroad. But if, in each and every of the respects above mentioned, the said railroads, and the several parts of said railroads, are built, equipped, and put into operation within the times and in the manner above agreed, and said railroad bridge constructed as above provided, then, and in

that event, and in that event only, shall the said bonds be delivered to said Minnesota Railway Construction Company by said depositary.

"It is further agreed, that, while said bonds are legally held in custody or trust by said depositary, as aforesaid, the interest-coupons, as they mature and become due, are to be delivered to the said construction company.

"It is further agreed, that the city of Winona shall have no cause of action against the Minnesota Railway Construction Company, by reason of the failure to build said lines of railroads, or any part thereof.

"In witness whereof, the said city of Winona has authorized their mayor to sign this instrument in their corporate name, and the city recorder to attest the same with his official signature and the seal of the city, and the board of directors of the Minnesota Railway Construction Company have authorized their president and secretary to sign, seal, and deliver the same in their corporate name.

"CITY OF WINONA,

"[SEAL.] By WM. S. DREW, *Mayor.*

"Attest: CHAS. F. SCHROTH, *City Recorder.*

"MINNESOTA RAILWAY CONSTRUCTION COMPANY,

"[SEAL.] By RUSSELL SAGE, *President.*

"Attest: JAMES M. MCKINLEY, *Assistant Secretary.*"

Schedule A, referred to in the foregoing contract, is as follows: —

"*Form of Deed.*

"STATE OF MINNESOTA, CITY OF WINONA.

"No. $1,000.

"Know all men by these presents, that the city of Winona, in Winona County, State of Minnesota, is indebted to Russell Sage and others, of the city and State of New York, or bearer, in the sum of $1,000, which they promise to pay to the bearer hereof, on the first day of January, 1891, in the city of New York, with interest thereon from the first day of January, 1871, at the rate of six per cent per annum, payable semi-annually at the Importers' and Traders' National Bank, in the city of New York, on the first day of January and July in each year, on the presentation and surrender of the annexed coupons as they severally become due.

"This bond is one of a series of like tenor and effect issued by

the city of Winona, to the amount of $100,000, to aid in the construction of a railroad from St. Paul to Winona.

"In witness whereof, the city of Winona has caused this bond to be sealed, signed, and delivered in their corporate name, by order of the city council of said city, pursuant to their resolutions in this respect passed , 1870.

"[SEAL.] THE CITY OF WINONA,

"By , *Mayor.*

"Attest: , *City Recorder.*"

The remaining facts are set forth in the opinion of the court, and it is unnecessary to restate them here.

There was a verdict for the plaintiff, and judgment was entered thereon.

The city of Winona sued out this writ.

Argued by *Mr. Thomas Wilson* for the plaintiff in error, and by *Mr. Charles E. Flandrau* for the defendant in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

This suit involves the interpretation of the contract between the city of Winona and the Minnesota Railway Construction Company, bearing date April 23, 1870. It was brought on certain coupons which were attached to the bonds whereof mention is made in that contract, and delivered by the depositary to the company after one-half of them in number and value were overdue. They were received by the plaintiff below, after their maturity and before the commencement of this suit.

The company stipulated that within three years from that date it would build, equip, and put in operation in its own name, or that of its successors and assigns, or of the St. Paul and Chicago Railway Company, a good and substantial railway from St. Paul to Winona (excepting a bridge across the Mississippi River at Hastings), and connect at Winona by bridge or ferry with the La Crosse, Trempealeau, and Prescott Railroad; that a part of said railway between certain points specifically mentioned should be completed and put in operation within one year; and that the La Crosse, Trempealeau, and Prescott Railroad, from its terminus opposite Winona, should be put in operation to a point on the Milwaukee and St. Paul Railway east of north La Crosse within the year 1870.

It was only by performing the stipulated conditions within the designated periods that the company could acquire a valid title to these evidences of indebtedness. In no case was any part of them to be delivered until a truss railroad bridge should be constructed across the Mississippi River at Winona, connecting the St. Paul and Chicago Railway, or the Winona and St. Peter Railroad, with the La Crosse, Trempealeau, and Prescott Railroad, at the then terminus of the latter.

These are the leading provisions of the contract. Its preamble recites that the construction of a railroad from St. Paul to Winona is of great public utility, and particularly advantageous to the latter city, and discloses that the controlling inducement for furnishing the promised aid to the company is to secure an unbroken line of travel by railroad between the East and West through Winona.

The depositary in whose hands the bonds and coupons were placed delivered them to the construction company March 27, 1872, after the road had been built from St. Paul to the western limits of Winona, and its track connected there with that of the Winona and St. Peter Railroad.

The liability of the city to pay these coupons is denied chiefly upon the ground that there was not such a compliance with the contract by the construction company as would entitle it to the possession of them.

The bill of exceptions shows that evidence was given tending to prove that the roads and parts of road mentioned in the contract had been respectively constructed, equipped, and put in operation within the appointed time, and the verdict of the jury is conclusive upon the questions of fact involved in the issue.

The exceptions to the charge of the court do not each require a special or extended consideration. At the date of the contract, the construction company had, for a certain consideration, agreed with the St. Paul and Chicago company to construct and equip its road between Chicago and St. Paul, and obtain the necessary right of way. It was to receive all gifts, bounties, or aids that might be given by any corporation or municipality to aid in building the projected road. The railroad company sold its road Jan. 3, 1872, to the Milwaukee and St. Paul Railway

Company, and the latter was properly held by the court below to be the successor of the construction company within the meaning of the contract. That part of the road which was to be completed within twelve months was equipped and put in operation by the Winona and St. Peter Railroad Company, under a contract with the Chicago and St. Paul Railroad Company, with the assent and approval of the construction company. In our opinion the court below correctly held, that constructing, equipping, and putting in operation the road between St. Paul and Winona by the construction company, the St. Paul and Chicago company, or the assignees of either, was in that regard a sufficient compliance with the contract.

The remaining charge to which exception was taken relates to the connection of the road from St. Paul with the track of the St. Peter Railway within the limits of Winona. The court instructed, that a connection of the track of the last-named railway with the railroad bridge across the river at Winona — said bridge connecting with the La Crosse Railroad at the point named in the contract — was a connection by bridge or ferry within the meaning of that contract, if, after the purchase of the St. Paul and Chicago Railroad by the Milwaukee and St. Paul Railroad Company, the latter company continued to run its cars over the railroad bridge and the Winona and St. Peter Railroad within the limits of the city.

It is contended that building the railway from St. Paul to the western limit of Winona, and uniting it there with the Winona and St. Peter road at a point more than a mile west of the west end of the bridge connecting the latter road with the La Crosse Railroad, was not, in the just sense of the term, a connecting of the road from St. Paul by bridge with the La Crosse Railroad, within the meaning or purview of the contract.

The contract, as we construe it, stipulates that the contemplated connection may be made by means of the Winona and St. Peter Railroad. One of its early provisions declares that the connection between the St. Paul and the La Crosse roads at Winona shall be by means of a bridge or ferry; but a subsequent one is express, that the bonds shall not be delivered until the bridge is constructed across the river at Winona, connecting the St. Paul Railway or the Winona and St. Peter road with

the La Crosse road at the then terminus of the latter. It was, therefore, optional with the construction company to build the St. Paul Railway over the bridge, and form an actual junction with the La Crosse road; or to build it to any point in the city, and make the required connection by means of the Winona and St. Peter road. Either of these modes would secure the object desired by the city, — an uninterrupted communication by rail from St. Paul across the river at Winona to the eastern seaboard.

It is contended that the contract is against public policy and without consideration. The obvious answer is, that it was expressly sanctioned by an act of the legislature of the State, and was designed to insure and expedite the construction of works of internal improvement deemed of vital importance to the material interests of the city. Whether it be expedient to invest municipal corporations with authority to aid in building railways, is a question foreign to the present inquiry; but where, as in this instance, it has been conferred and exercised, and the city has secured the advantages of the contract, the law will not suffer her to escape from its obligations.

Judgment affirmed.

BOARD OF SUPERVISORS OF WOOD COUNTY v. LACKAWANA IRON AND COAL COMPANY.

The acts of March 8, 1867, c. 93, of March 3, 1869, c. 166, and of Feb. 17, 1871, of Wisconsin, under which certain bonds were issued to the Green Bay and Lake Pepin Railroad Company, were not repealed, either directly or by implication, by the acts of the legislature of that State of March 8, 1870, c. 210, and of March 11, 1872, c. 34.

ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

Submitted on printed arguments by *Mr. P. L. Spooner* and *Mr. S. L. Dixon* for the plaintiffs in error, and by *Mr. S. U. Pinney* for the defendant in error.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an action at law brought by the defendant in error to

recover the amount due upon certain coupons taken from bonds issued by the plaintiff in error to the Green Bay and Lake Pepin Railroad Company, of which coupons the plaintiff in error was the owner and holder. The coupons were payable to the treasurer of the company or order, and it was not questioned that the plaintiff became their holder *bona fide*. The bonds and coupons were issued under the authority conferred by the acts of the legislature of the State of March 8, 1867, c. 93, of March 3, 1869, c. 166, and of Feb. 17, 1871, c. 76 (Private and Local Laws of Wisconsin). The two last were amendatory of the first-named act. Every thing touching the issue of the bonds was in conformity to the requirements of these statutes, and, so far as this point is concerned, the validity of the bonds is not denied. Further remarks upon the subject are, therefore, unnecessary. But it is insisted, that before the bonds were issued, and before the contract for their issue was entered into, the acts under which they were issued were repealed by the act of March 8, 1870, c. 210, and the act of March 11, 1872, c. 34. These references are also to the local and private laws of the State. The latter of these acts was amendatory of the former.

There was certainly no express repeal. This is not alleged. The proposition is, that there was such repeal by implication.

This renders it necessary to examine the subject.

The Green Bay and Lake Pepin Railroad Company was incorporated with authority to construct a railway from Green Bay, in Wisconsin, to the Mississippi River. There was no designation of the counties through which it should pass. Prior to the passage of the act of March 11, 1872, c. 34, no work had been done on the line of the road west of New London, a town between the termini of the road. From New London to Grand Rapids, by the line of the road, was about forty-five or fifty miles; and it was forty miles from the latter place to the nearest point on the Milwaukee and St. Paul Railroad. On the 9th of February, 1871, the company submitted its first proposition for the exchange of the stock of the company for the bonds of the county. Grand Rapids and Centralia are in Wood County, opposite to each other, upon the Wisconsin River. The company asked for $200,000 of bonds, — $100,000 to be delivered when the railway was "graded, tied, and ironed," from Fort

Howard to Grand Rapids; $50,000 when the work was so done from Fort Howard, and a bridge built over the Wisconsin River from Grand Rapids, to Centralia; and the remaining $50,000 when the roadway was so "graded, tied, and ironed as far west as Yellow River." If the road were not so built to Grand Rapids by the 1st of January, 1872, the first instalment of the bonds was to be forfeited; and, if not so built to Centralia and Yellow River by the 1st of January, 1873, the residue of the bonds was to be forfeited in like manner.

The proposition was submitted to a popular vote, and duly sanctioned thereby pursuant to law. The company finding itself unable to comply with the first condition in point of time, on the 16th of December, 1871, submitted a further proposition, to the effect that the county should exchange $50,000 of the bonds for stock of the company to the like amount upon the road being so built to Grand Rapids, the claim of the company to these bonds to be forfeited unless the work was done by the 1st of January, 1873. This proposition was also duly sanctioned by the requisite popular vote. This was a modification of the pre-existing contract, by the elongation of the time for the fulfilment of the first condition, and the reduction of the amount of the bonds the company was to receive. As thus modified, the original contract was fulfilled by both parties. The work was done and the bonds were delivered. The amount was $150,000. The coupons upon which this suit was brought were taken from a part of these bonds. Before any thing was done touching the issue of the bonds, the legislature of Wisconsin incorporated "The Wisconsin Valley Railway Company," with authority to construct a railroad "from such point on or near the La Crosse and Milwaukee Railroad, between Kilborne City and the tunnel on said road, as its directors should select, to Wausau, *via* Grand Rapids." The line of this road approached Grand Rapids from the west, and the Green Bay and Lake Pepin road from the east. Nothing had been done with respect to the locating or building of either road through Wood County prior to the passage of the act of 1870, and the act amending it, by which it is alleged the repeal was wrought. The act of 1867, under which the bonds were issued, declares that "it shall be lawful for every county, through any portion of which the

Green Bay and Lake Pepin Railway shall run, or any town or incorporated village in such county, to issue and deliver to said company its bonds, payable," &c., "as may be agreed upon by and between" the company and the designated authorities of the county. The act is entitled "An Act to authorize the counties and towns through which the Green Bay and Lake Pepin Railroad passes, to aid in its construction." The amendatory acts of 1869 and 1871, except the third section of the latter act, are confined to details with respect to the proceedings of the county. That section will be presently considered in another connection.

The act of March 8, 1870, relied upon by the plaintiff in error, is entitled "An Act to authorize the county of Wood to aid in the construction of railroads." The amendatory act of 1872 only restricts and lessens the amount of the aid authorized to be given by the original act, and abridges the time of the notice for the popular vote. This latter act may, therefore, be laid out of view. The prior act, in the first section, declares that bonds may be issued "for the purpose of aiding in the construction of the Wisconsin Valley Railroad, from any point on the line of the Milwaukee and St. Paul Railway to the city of Grand Rapids or the village of Centralia in the county of Wood, or in the construction of any other railway of greater length which may first be built from any other direction to the said city of Grand Rapids or the village of Centralia." The second section authorizes the county to contract for aid to "any railroad company that shall undertake the construction of a railroad from any point on the line of the Milwaukee and St. Paul Railway to the said city of Grand Rapids or village of Centralia, or with any other railroad company that shall propose to construct from another direction a railroad of greater length into the said city or village," &c. The act of 1867 is confined to the Green Bay and Lake Pepin company, and the aid specified was to be given upon its running through "any portion" of Wood County, whether it did or did not go to Grand Rapids or Centralia. The act of 1870, on the other hand, applies to all such companies as should construct roads to one or the other of those places.

Looking at the face of the statutes, there is certainly no

repugnancy between them. Their scope and purposes are distinct and different, and they may well stand together. The fact that the Green Bay and Lake Pepin company chose to take their road to Grand Rapids and Centralia does not affect the question. They could not by an act *in pais* give a repealing effect to the statute of 1870, which it would not have had if the act *in pais* had not been done.

The parties concerned in the issue of the bonds seem to have had no idea that there had been any such repeal as is contended for. This must have been the view of the railroad company when it submitted its two propositions of Feb. 9, 1871, and Dec. 16, 1871, when it built the road, and when it received the bonds; of the voters of the county, when they gave their sanction to those propositions, and authorized the bonds to be issued; and of the county authorities, when they called for the vote, announced the result, and issued and delivered the bonds to the company accordingly. The legislature must have had the same understanding. The act of Feb. 17, 1871, names the act of 1867 by its title, and amends it. Why amend, if it had been repealed by the prior act in question of 1870? Again: the third section of this amendatory act declares that the act published March 8, 1870 (c. 24, Gen. Laws), entitled "An Act to encourage the construction of railroads in this State," "shall not be construed as repealing or otherwise affecting the act to which this act is amendatory," &c. Why this careful provision against the repeal of the act amended, if the act of 1870 had already repealed it? Again: the act of March 17, 1873, amending the act entitled "An Act to incorporate the Green Bay and Lake Pepin Railway," enacts that "the counties of Brown and Wood, each of which has issued $150,000 of bonds in aid of the construction of the Green Bay and Lake Pepin Railway," and all other towns and villages which had issued bonds for the same purpose, "shall, so long as they respectively continue to hold and own the stock of said railway company issued or to be issued in exchange for such bonds, in addition to the right to vote for all other directors of said company, have the exclusive right of and among themselves, by the vote of a majority of the shares owned by them collectively, to elect one of the directors of said company, who shall be styled *the municipal director*,"

&c. If the act of 1867 had been repealed, as is claimed, the bonds were, as is now maintained, utterly void, and the holders of the stock had no title, and consequently could have no right to vote upon it. But, on the contrary, the existence and validity of the act when the bonds and stock were issued, and the validity of the title of the rightful holders of both, are affirmed by the clearest implication. None could be stronger; and what is so implied in a statute, contract, will, pleading, or other instrument of writing, is as effectual as what is expressed. *United States* v. *Babbit*, 1 Black, 61. Repeal by implication is not favored in the law. It is held to occur only where different statutes cover the same ground, and there is a clear and irreconcilable conflict between the earlier and the later. The rule, as thus stated, is so well settled, that discussion and the citation of authorities are unnecessary.

The statute-book of 1870 shows the spirit by which the legislature was then animated, with respect to the policy of permitting aid to be given to railroad companies by means of municipal bonds. It was in favor of the largest latitude. Chapter 24, before mentioned, is a striking instance of such legislation. It permitted "any town, incorporated city, or village, into, near to, or through" which the line of any railroad should be located, to take the stock of the company to such amount as should be authorized by a majority of the voters, — there was no other check or limit prescribed, — and to pay for it with a like amount of town, city, or village bonds, authorized by the vote of such majority to be issued for that purpose. It was not a time when there was a disposition to repeal any act of the character of the act of 1867. The current was altogether in the other direction. The reaction set in at a later period. The act of 1867 was in no wise affected by the act of 1870. There was, therefore, no repeal of the latter by implication or otherwise. It is suggested further, in behalf of the plaintiff in error, that the amount found by the verdict of the jury, and for which the judgment was rendered, includes interest on the coupons, which, it is alleged, is contrary to a statute of the State in force when the bonds were issued. It is sufficient to say upon this subject, that the objection, not having been made in the court below, cannot be taken here. To hold otherwise would involve

the exercise on our part of original instead of appellate jurisdiction. This is not permitted to us.

The instructions given to the jury by the learned judge who tried the case in the Circuit Court were correct.

Judgment affirmed.

MR. JUSTICE DAVIS, being interested in the question, as one of the executors of a will, took no part in the decision of this case.

UNITED STATES v. FERRARY ET AL.

1. Where, pursuant to the tenth section of the act of July 20, 1868 (15 Stat. 129), a survey of a distillery and an estimate of its producing capacity is made, and a copy thereof furnished the distiller, such survey and estimate conclusively determine the producing capacity of the distillery, fix the minimum tax due from him, and can only be abrogated by a new survey and estimate, ordered by the Commissioner of Internal Revenue, a copy of which is furnished to the distiller.
2. An abortive attempt to make a new estimate to take the place of the former cannot have the effect to annul it.

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

This is an action on a distiller's bond given to the United States under the seventh section of the act of July 20, 1868, 15 Stat. 127. The tenth section of that act is as follows: —

"Immediately after the passage of this act, every assessor shall proceed, at the expense of the United States, with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered, or intended to be registered, for the production of spirits in his district, to estimate and determine its true producing capacity, and in like manner shall estimate and determine the capacity of any such distillery as may hereafter be so registered in said district, a written report of which shall be made in triplicate, signed by the assessor and the person aiding in making the same, one copy of which shall be furnished to the distiller, one retained by the assessor, and the other immediately transmitted to the Commissioner of Internal Revenue. If the Commissioner of Internal Reve-

nue shall, at any time, be satisfied that such report of the capacity of a distillery is in any respect incorrect, or needs revision, he shall direct the assessor to make, in like manner, another survey of said distillery; the report of said survey shall be executed in triplicate, and deposited as hereinbefore provided."

In the fall of 1870, Ferrary, the principal in the bond, proposed to commence distilling whiskey at Louisville, Tenn., within the second collection district of that State. Nov. 10, 1870, an assistant assessor of that district, with a person to aid him, designated by the Commissioner of Internal Revenue, made the survey agreeably to the requirements of the foregoing section, measured the tubs, and estimated the true producing capacity of the distillery. Triplicates of the report of this survey, made under the assessor's direction, were signed by him and the person aiding him; one copy was retained by him, another sent to the Commissioner of Internal Revenue, and the third furnished to Ferrary. By this survey and report the producing capacity of the distillery was estimated upon the basis of three gallons of whiskey for each bushel of corn.

The bond now in suit was entered into Nov. 8, 1870. It is conditioned "in all respects faithfully to comply with all the provisions of law in relation to the business and duties of distillers, and pay all penalties incurred," &c., and recites Ferrary's intention to be engaged in distilling from Nov. 15. The exceptions state that he manufactured whiskey from Dec. 16, 1870 (the date of the approval of the bond), to March 10, 1871. Nov. 18, 1870, the Commissioner of Internal Revenue officially informed the assessor that the report of survey, dated Nov. 10, 1870, was "regarded as erroneous in respect to the dry inches and the yield of spirit to the bushel. According to the ruling of this office, three dry inches for rye and seven for corn are the true allowances for tubs sixty inches or under in depth;" adding, that if the distillation was "by direct steam, the yield should be three and a half gallons to the bushel." The assessor was accordingly ordered to make another survey, as provided in sect. 10, before referred to; and the letter concluded, "as no new measurements are required," no expense was to be allowed. The second report thus demanded was made Nov. 22, 1870, with the desired amendments, fixing the producing

capacity at three and a half gallons per bushel. In making this new estimate and determination of the producing capacity, the officers did not again visit the distillery, nor make any new measurements of any part thereof, but gave all the old measurements of the former report. Triplicate copies of this last report were made; one retained by the assessor, and one sent to the commissioner. The assessor's clerk swore to having either mailed or delivered the third copy to Ferrary, and other evidence was introduced tending to show that it reached him; but he denied receiving or having any knowledge of it till about the time he closed his distillery, in March, 1871. His mail-clerk and other employés testified in a manner tending to negative its delivery at the distillery.

Assessments were made for December, 1870, January, February, and March, 1871, based upon the estimates of the second report of survey; but the evidence showed that if they had been based upon the first, there would still have been a deficiency, for which Ferrary would be liable to be assessed. After instructions not excepted to, the presiding judge told the jury that if the second report of survey was not actually made by the assessor, or assistant assessor, and his designated assistant, in like manner with the survey which was the foundation of the first report, then said second report of survey was invalid, and any assessments based thereon would also be invalid, and the plaintiff could not recover thereon in this action. The plaintiff excepted to this instruction, as well as to an instruction that "if the jury should be satisfied from the evidence that a second survey had not been made, or that a second copy of the same was not furnished Ferrary, then their verdict must be for the defendants." The plaintiff asked the judge to instruct the jury: 1st, That the first report of survey was valid and binding until the same was abrogated by authority of law; and that was only when defendant was furnished with a copy of resurvey or second survey. 2d, That, if the copy of the second survey ordered was furnished to the defendant, he would be bound by it; but if he never received it, and continued to operate his distillery under the first one, then he would be bound by the first survey, of which he admitted having received a copy. These instructions were refused, upon the ground

that no assessment was based on the first survey. An exception was taken to such refusal.

The jury found a verdict for the defendants; and, judgment having been rendered thereon, the United States sued out this writ of error.

Argued by *Mr. Assistant Attorney-General Smith* for the plaintiff in error, and by *Mr. E. C. Camp* for the defendant in error.

MR. JUSTICE STRONG delivered the opinion of the court.

The act of July 20, 1868, which imposes taxes on distilled spirits and tobacco, directs that there shall be levied and collected on all distilled spirits on which the tax then prescribed by law had not been paid a tax of fifty cents on each and every proof gallon, to be paid by the distiller, owner, or person having possession thereof, before removal from distillery warehouse. It also declares that every proprietor or possessor of a still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom. To determine the quantity of spirits produced, three returns in each month are required to be made to the assessor, stating the quantity and kind of materials used, and the number of wine gallons and proof gallons made and placed in warehouse. These returns it is made the duty of the assessor to examine, and he is required to make assessments for deficiencies. The twentieth section of the act also enacts that the quantity of spirits returned, together with the deficiency assessed, shall in no case be less than eighty per cent of the producing capacity of the distillery, as estimated under the former provisions of the act. Thus a liability is imposed upon the distiller of a tax of fifty cents upon eighty per cent, at least, of the producing capacity of the distillery. And such capacity is ascertained and information of it is given to the distiller before he commences his manufacture. A survey is made of his distillery, and an estimate is based on the survey of its true producing capacity, one copy of which is furnished to the Commissioner of Internal Revenue, one is retained by the assessor, and one is given to the distiller himself. These requirements of the law respecting the survey and the estimate were com-

plied with in the present case. A survey of Ferrary's distillery, together with an estimate of the producing capacity, was made on the 10th of November, 1870, and a copy of it was furnished to him. He had previously — to wit, on the eighth day of the same month — given the bond upon which this suit was brought (the other defendants being his sureties), conditioned for faithful compliance with all the provisions of law in relation to the duties and business of distillers, and on the sixteenth day of the same month he commenced distilling. So long as that survey and estimate remained unchanged, we think they conclusively determined the producing capacity of the distillery, and fixed the minimum tax due from the distiller. The bill of exceptions, however, shows that on the 18th of November the Commissioner of Internal Revenue directed the assessor to make another survey, stating in his letter that no new measurements were necessary, and, consequently, that no expense was to be allowed or incurred. The commissioner's object in giving the direction, as plainly appears from his order, was to obtain, not a new survey, but a new estimate of producing capacity, founded on the prior survey and measurements. No new survey was made under it, and no new estimate is proved to have been given to the distiller. It must, therefore, be conceded that his liability for taxes was not affected by it, and that the assessor was not authorized to make any assessment founded on any other survey or estimate than the one of Nov. 10, 1870. But what then? That survey and estimate remained in force. An abortive attempt to make a new estimate to take the place of the former cannot have the effect to annul it. If it could, the distiller would escape from any tax measured by the producing capacity of his distillery, though under the act of Congress; without an ascertainment of that, he is not at liberty to distil at all. The first survey and estimate was valid and binding, as we have said, until it was abrogated by authority of the law, and it could only be abrogated by a new survey and estimate ordered by the commissioner, a copy of which was furnished to the distiller. Thus the Circuit Court was asked to instruct the jury, and we think there was error in refusing to give the instruction asked. There was error, also, in the refusal to affirm the other proposition of the

plaintiffs, which was, "that if the copy of the second report ordered was furnished the defendant, no matter how, so he received it, he would be bound by it; but if he never received it, and continued to operate his distillery under the first one, then he would be bound by the first survey, of which he admits having received a copy." There was also error in the instructions actually given to the jury, as well as in the refusal to give that asked by the plaintiffs.

The learned judge evidently confounded the survey required by the tenth section of the act of Congress with the estimate and determination of producing capacity calculated from the survey. Hence he instructed the jury, that if the second report of survey, of which there was some evidence, was not actually made by the assessor or assistant assessor, and his designated assistant, in like manner with the survey made as the foundation of the report of survey first made, the second report was invalid, and any assessment against the distiller based thereon would be invalid, and the plaintiffs could not recover thereon in this action. To this he added, that if the jury were satisfied from the evidence that a second survey had been made, or that a copy of the same had been furnished to Ferrary, the distiller, their verdict must be in favor of the defendants. This was misleading. There was no pretence that a second survey had been made. None was contemplated by the order of the commissioner. That order expressly stated that no new measurements were required. All that was done was forming a corrected estimate, resting on the first measurements. If the corrected estimate was inoperative because of failure to furnish the distiller with a copy of it, his liability for the taxes, determined by the survey that was made, and the estimate based thereon, remained undisturbed. The suit was not founded on an inoperative assessment, as the court seems to have assumed. It was brought on the distiller's bond; and the breach averred was non-compliance with the provisions of the law in relation to the duties and business of distillers, one of which was the payment of taxes legally assessed against him. Ferrary had full information of the sums due from him. The law fixed the rate at fifty cents for each gallon of spirits produced, and the survey and estimate which was furnished him informed him

of the producing capacity of his distillery, and made it his duty to pay the tax on at least eighty per cent of that. Thus the law fixed both the rate and amount. If the assessor claimed more, without warrant, his claim did not relieve Ferrary from the duty of paying what was due, the amount prescribed by the law. So the jury should have been instructed.

Judgment reversed, and a venire de novo awarded.

DONALDSON, ASSIGNEE, v. FARWELL ET AL.

1. Where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods.
2. The defeasible title of the vendee to the goods so acquired vests in his assignee in bankruptcy, and is subject to be determined by the prompt disaffirmance of the contract by the vendor.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

Emanuel Mann, a merchant doing business at Richfield, a small village on the St. Paul Railway, filed, May 24, 1872, his petition, in the District Court of the United States for the Eastern District of Wisconsin, to be declared a bankrupt. He was duly adjudged a bankrupt the sixth day of June then next ensuing, and the plaintiff was, on the first day of the following July, appointed his assignee.

In the month of April of that year the defendants sold, at Chicago, to Mann, on credit, merchandise amounting in value to $5,000. The last of the invoices bears date the 17th of that month. His son was the agent in making the purchase, and directed the goods to be shipped to Milwaukee, stating that it was his intention to have them hauled from there to Richfield. He knew that his father was then, and for two or three years before had been, insolvent, and he testified, on the trial, that at the time of the purchase he did not expect that his father would pay for the goods, that he did not expect to pay for them himself, and that his object in having them sent to Milwaukee was to place them in the hands of one Schram, in order

that they should be there disposed of and the proceeds paid to some creditors of his father, who had sold him produce and advanced him money. The goods were shipped to "E. Mann, Milwaukee," conformably to the directions. They were, on their arrival, sent to Schram's store. Mann was reputed to be solvent. The defendants had no notice of his insolvency until the last days of May. On the 5th of June, ascertaining that a large quantity of the goods was in the loft of a store in Milwaukee, they took possession of them. They subsequently found the remaining goods, with the exception of $100 in value, in the store of Mann, at Richfield, and, after formally demanding them of the assignee, took and shipped them to Chicago. This action is brought by the assignees to recover the value of them.

The court gave the jury a general charge, to the following parts of which the plaintiff excepted:—

"The sale made by the defendants passed the title in the property to the bankrupt, but it passed a defeasible title; that is to say, it could be rendered inoperative at the instance of the vendors, Farwell & Co.

"If the bankrupt retained the property at the time of the filing of the petition in bankruptcy, the title passed to the assignee, and, as we think, the weight of authority is it passed as a defeasible and not as an absolute title, with the right still on the part of the vendors to reclaim the property, provided it was done within a reasonable time after the sale, and after knowledge of the fraud which had been perpetrated."

There was a verdict for the defendants. Judgment having been rendered thereon, the assignee sued out this writ of error.

Argued by *Mr. W. P. Lynde* for the plaintiff in error.

There was in this transaction no artifice to mislead the vendor, and no false pretences; consequently there was no fraud. *Whittaker* v. *Shackleton*, 10 Ch. App. Cas. 449; *Backentoss* v. *Spicher*, 31 Penn. St. 326. While an intention not to pay is dishonest, it is not fraudulent. 6 Watts, 34; 6 Wend. 81. The vendor has his remedy by an action on the contract.

Nor does insolvency make a sale voidable after delivery of the goods sold. 6 Wend. 81; 2 Mason, 240.

Mann was the owner of these goods at the time the bank-

ruptcy proceedings were commenced, and could have sold them and given a perfect title. His title was absolute, and became vested in his assignee under the fourteenth section of the Bankrupt Act.

Even if the purchase was fraudulent, the vendor had neither a legal nor an equitable right in the property until he had annulled the contract of sale. He had a mere *jus ad rem*. Having taken no steps to annul the contract and reclaim the goods until after the commencement of proceedings in bankruptcy, by which all the rights of property, with all the power and authority of the bankrupt over it, had passed to the assignee, the vendor could no longer rescind.

The assignee stands in the position of a *bona fide* purchaser, and his title is not subject to be defeated by any action by the vendor of the bankrupt. Archbold on Bankruptcy, 202; *Milwood* v. *Forbes*, 3 Esp. 171; *Sinclair* v. *Stevenson*, 10 Moore, 46; 2 Bing. 514; *Haswell* v. *Hunt*, 59 T. R. 231; *Bank of Leavenworth* v. *Hunt*, 11 Wall. 391.

Mr. E. Mariner, contra.

MR. JUSTICE DAVIS delivered the opinion of the court.

The instructions present the questions of law arising upon the facts which this controversy involves. The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. *Byrd* v. *Hall*, 2 Keyes, 647; *Johnson* v. *Monell*, id. 655; *Noble* v. *Adams*, 7 Taunt. 59; *Kilby* v. *Wilson*, Ryan & Moody, 178; *Bristol* v. *Wilsmore*, 1 Barn. & Cress. 513; *Stewart* v. *Emerson*, 52 N. H. 301; Benjamin on Sales, sect. 440, note of the American editor, and cases there cited.

Here the vendors exercised the right of rescission shortly after the sale in question, and as soon as they obtained knowledge of the fraud. If, therefore, this controversy were between Mann and them, it is clear that he would not be entitled to recover.

The assignment relates back to the commencement of the proceedings in bankruptcy, and vests, by operation of law, in the assignee the property of the bankrupt, with certain specified exceptions, although the same be then attached. It also dissolves any attachment made within four months next preceding the commencement of the proceedings. If there be no such liens, and the property has not been conveyed in fraud of creditors, he has no greater interest in or better title to it than the bankrupt. Only the defeasible title of the latter to the goods in controversy passed to the assignee, and it was determined by a prompt disaffirmance of the contract.

Judgment affirmed.

HEYDENFELDT v. DANEY GOLD AND SILVER MINING COMPANY.

1. At the time of the passage of the Nevada Enabling Act, approved March 21, 1864 (13 Stat. 30), sections 16 and 36 in the several townships in Nevada had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public domain within her limits.
2. The words of present grant in the seventh section of that act are restrained by words of qualification which were intended to protect the proposed new State against loss that might happen through the subsequent action of Congress in selling or disposing of the public domain. If by such sale or disposal the whole or any part of the sixteenth or thirty-sixth section in any township, was lost to the State, she was to be compensated by other lands equivalent thereto, in legal subdivisions of not less than one-quarter section each.
3. A qualified person, whose settlement on mineral lands which embrace a part of either of said sections was prior to the survey of them by the United States, and who, on complying with the requirements of the act approved July 26, 1866 (14 Stat. 251), received a patent for such lands from the United States, has a better title thereto than has the holder of an older patent therefor from the State.
4. The legislative act of Nevada, of Feb. 13, 1867, recognized the validity of the claim of the United States to the mineral lands within that State.

ERROR to the Supreme Court of the State of Nevada.

This is an action of ejectment brought by Heydenfeldt in the District Court of the First Judicial District of Nevada, against the Daney Gold and Silver Mining Company. The case was tried by the court, which found the following facts: —

On the fourteenth day of July, 1868, the State of Nevada issued to one William Webelhuth its patent for the west half of the south-west quarter of section 16, township 16 north, range 21 east (lying in Lyon County, State of Nevada), Mount Diablo base and meridian, containing eighty acres, according to the official plat of the survey of public lands as made by the United States surveyor-general for the district of Nevada; which said patent was recorded in the recorder's office of the county of Lyon on the twenty-fifth day of July, 1868, and was issued by the State authorities, under and by virtue of the statute of Nevada, conveying lands assumed to have been granted to the State by the act of Congress approved March 21, 1864, entitled "An Act to enable the people of the Territory of Nevada to form a State government upon certain conditions."

On the eighteenth day of August, 1873, William Webelhuth, by deed of conveyance duly signed, sealed, and acknowledged, conveyed the same premises to one Philip Kitz, which deed was recorded in the recorder's office of the county of Lyon Jan. 13, 1874.

On the ninth day of January, 1874, Philip Kitz, by deed duly signed, sealed, and acknowledged, conveyed the same premises to this plaintiff, which said deed was duly recorded in the recorder's office of the county of Lyon on the same day.

The defendant is in the possession of the premises. The plaintiff, prior to bringing this action, demanded the possession thereof, but the same was refused.

On the second day of March, 1874, the United States, by its proper authorities, granted to the defendant, by its patent, in due and regular form, lot No. 72, embracing a portion of section 16, in township 16 north of range 21 east, Mount Diablo meridian, in the Devil's Gate mining district, in the county of Lyon and State of Nevada, in the district of lands subject to sale at Carson City, embracing thirteen (13) acres and seventy-eight one hundredths ($\frac{78}{100}$) of an acre, more or less, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of the survey of said premises not expressly excepted, and of two thousand linear feet of Mammoth Lode ledge, vein, or deposit for said two thousand

feet therein throughout its entire depth, &c., which said grant by the patent covers and includes the lands and premises sought to be recovered by the plaintiff from the defendant in this action, and which said patent was so issued to the defendant under and by virtue of the act of Congress approved July 26, 1866, entitled "An Act granting the right of way to ditch and canal owners over the public land, and for other purposes;" the act amendatory thereof, approved July 9, 1870, and the act approved May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States."

The land in controversy is mineral land, containing precious metals, and the defendant is in possession and is conducting and carrying on the business of mining thereon, having in the prosecution of mining erected and constructed improvements of the value of over $80,000.

In 1867, and prior to the date of the survey or approval of the survey of section 16, township 16 north, range 21 east, by the United States, the defendant's grantors and predecessors in interest had entered upon the premises described by plaintiff in his complaint for mining purposes, and had claimed and occupied the same in conformity to the laws, customs, and usages of miners in the locality and mining district in which said premises are situated, and were so possessed and engaged in mining thereon when the said land was first surveyed, and when the State of Nevada issued its patent as aforesaid to William Webelhuth.

Thereupon, as conclusions of law, the court found, —

The act of Congress approved March 21, 1864, enabling the people of the Territory of Nevada to form a constitution, &c., under and by virtue of which act the State of Nevada selected the land, and sold and conveyed the same to the predecessors in interest of the plaintiff, did not constitute a grant *in præsenti*, but an inchoate, incomplete grant until the premises were surveyed by the United States, and the survey properly approved.

Said survey and the approval thereof not having been made prior to the entry thereon and claim thereto by defendant's predecessors in interest for mining purposes, the same was not

by said act of Congress, or in any other manner, ever granted by the United States to the State of Nevada.

The entry of defendant's grantors thereon for mining purposes, and their rights thereto having become established prior to the survey of said section by the United States, the said premises were not included within, and did not pass to the State of Nevada, by the granting clause contained in said act of Congress of March 21, 1864, but, on the contrary, were excluded therefrom by reason of their having been previously possessed and occupied by defendant's grantors for mining purposes, in conformity with the mining laws, rules, and customs of miners in the locality where the same was situated, and in conformity with the act of Congress approved July 26, 1866, granting the right of way to ditch and canal owners over the public lands, and for other purposes.

Thereupon judgment was rendered for the defendant. The Supreme Court of Nevada having affirmed it, the plaintiff sued out this writ of error.

Submitted on printed arguments by *Mr. W. E. F. Deal* for the plaintiff in error, and by *Mr. C. E. De Long* for the defendant in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The validity of the patent from the State under which the plaintiff claims title rests on the assumption that sections 16 and 36, whether surveyed or unsurveyed, and whether containing minerals or not, were granted to Nevada for the support of common schools by the seventh section of the Enabling Act, approved March 21, 1864, 13 Stat. 32, which is as follows: "That sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter-section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools."

This assumption is not admitted by the United States, who, in conformity with the act of Congress of July 26, 1866, 14 id. 251, issued to the defendant a patent to the land in controversy, bearing date March 2, 1874. Which is the bet-

ter title is the point for decision. As it has been the settled policy of the government to promote the development of the mining resources of the country, and as mining is the chief industry in Nevada, the question is of great interest to her people.

It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. "It is better always," says Judge Sharswood, "to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction. *Gyger's Estate*, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government, and come into the Union. The terms of admission were proposed, and, as was customary in previous enabling acts, the particular sections of the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that Territory.

But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, oper-

ating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the mean time, further improvements would be arrested, and the persons, who prior to the surveys had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections. Congress was fully advised of the condition of Nevada, of the evils which such a measure would entail upon her, and of all antecedent legislation upon the subject of the public lands within her bounds. In the light of this information, and surrounded by these circumstances, Congress made the grant in question. It is ambiguous; for its different parts cannot be reconciled, if the words used receive their usual meaning. *Schulenberg* v. *Harriman*, 21 Wall. 44, establishes the rule that "unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense." We do not seek to depart from this sound rule; but, in this instance, words of qualification restrict the operation of those of present grant. Literally construed, they refer to past transactions; but evidently they were not employed in this sense, for no lands in Nevada had been sold or disposed of by any act of Congress. There was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. Congress cannot be supposed to have intended a vain thing, and yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress in selling or disposing of the public domain. It could not, as we have seen, apply to past sales or dispositions, and, to have any effect at all, must be held to apply to the future.

This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the Territory. Besides, no other construction is consistent with the statute as a whole,

and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the 16th and 36th sections in each township. Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.

It is argued, that, conceding the soundness of this construction, the defence cannot be sustained, because the land in controversy was not actually sold by direction of Congress until after the survey. This position ignores a familar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand, if possible. 1 Bouv. Inst. p. 42, sect. 7. The language used is, "sold or otherwise disposed of by any act of Congress." The point made by the plaintiff would reject a part of these words, and defeat one of the main purposes in view. Congress knew, as did the whole country, that Nevada was possessed of great mineral wealth, and that lands containing it should be disposed of differently from those fit only for agriculture. No method for doing this had then been provided; but Congress said to the people of the Territory, "You shall, if you decide to come into the Union, have for the use of schools sections numbered 16 and 36 in every township, if on survey no one else has any valid claim to them; but until this decision is made and the lands are surveyed, we reserve the right either to sell them or dispose of them in any other way that commends itself to our judgment. If they are sold or disposed of, you shall have other lands equivalent thereto." The right so reserved is subject to no limitation, and the wisdom of not surrendering it is apparent. The whole country is interested in the development of our mineral resources, and to secure it adequate protection was required for those engaged in it. The act of Congress of July 26, 1866, *supra*, passed before the land

in controversy was surveyed, furnishes this protection, by disposing of the mineral lands of the United States to actual occupants and claimants, and providing a method for the acquisition of title. The defendant, and those under whom it claims, occupied the land prior to the survey, and were entitled to purchase. The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right to the exclusion of all adverse intervening claims.

These views dispose of this case; but there is another ground equally conclusive. Congress, on the 4th of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of Feb. 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the government of the United States to the mineral lands."

It is objected that the constitution of Nevada inhibited such legislation; but the Supreme Court of the State, in the case we are reviewing, held that it did not, 10 Nev. 314; and we think their reasoning on this subject is conclusive.

Judgment affirmed.

BAYNE ET AL., TRUSTEES, v. UNITED STATES.

A party who obtains from a disbursing officer public moneys without right thereto, and with full knowledge that they are such, becomes indebted to the United States, within the meaning of the fifth section of the act of Congress of March 3, 1797 (1 Stat. 515), and, in the event of his insolvency, the United States is entitled to priority of payment out of his assets.

APPEAL from the Circuit Court of the United States for the District of Maryland.

Argued by *Mr. S. Teakle Wallis* and *Mr. Thomas W. Hall, Jr.*, for the appellants, and by *Mr. R. T. Merrick* for the appellee.

MR. JUSTICE DAVIS delivered the opinion of the court.

This suit was brought by the United States against the trustees of Bayne & Co. The court below passed a decree declaring the United States to be a preferred creditor of that firm in the sum of $100,000, and directing the trustees to pay it out of the trust fund in their hands, as far as it would suffice therefor, to the exclusion of the claims of any other creditor. The trustees appealed to this court.

The proofs, although conflicting in some particulars, establish the material facts which entitle the complainant to relief. The United States, March 31, 1866, gave a draft in favor of Brevet Lieut.-Colonel Edward E. Paulding, a paymaster in the army, for $200,000, on the First National Bank of Washington, D. C., a depositary of public money, duly designated as such by the Secretary of the Treasury. He deposited it to his credit, as such officer, in that bank, the thirteenth day of the following April. He had no individual account there. On the 21st of the latter month he drew two checks on that bank, each for $100,000, indorsed them in blank, and sent them to the cashier of the Merchants' National Bank of Washington, who presented them to the former bank, with the information that Lawrence P. Bayne, a member of the firm of Bayne & Co., desired that $100,000 should be deposited to its credit in New York. This was done, and the amount realized by Bayne & Co., who, it is not pretended, were creditors of the United States. One half of the remaining $100,000 was paid in currency to the Merchants' Bank. A draft in its favor on New York for the residue was afterwards transferred by it to Bayne & Co.

The decree confines the rights of the United States as a preferred creditor of Bayne & Co. to the $100,000 deposited to the credit of the firm in New York, and no question as to the remainder is now before us.

On the 2d or 3d of the next month (May) Bayne & Co. suspended payment, and on the 5th made an assignment in favor of their creditors, making certain preferences, which have no bearing on the present controversy. The Merchants' Bank was largely the creditor of Bayne & Co., and met with a disastrous failure, occasioned in a great degree by the insolvency of that firm.

Government funds in a bank, which is a public depositary, can only be lawfully withdrawn therefrom by a disbursing officer, to meet the legitimate requirements of the public service. The money in question was applicable to a specific purpose, and diverting it, as was done in this case, to other uses was a criminal misappropriation of it. Even its transfer to another depositary, although no private interest was to be thereby subserved, was forbidden by an explicit and peremptory general order of the paymaster-general. We are fully satisfied by the proofs that the transactions between Paulding, the Merchants' Bank, and the First National Bank, were the result of a fraudulent purpose to secure the use of the public money to Bayne & Co., who received it with full knowledge that it belonged to the United States, and had been applied in manifest violation of the act of Congress. The law imposes on that firm an obligation, and implies a promise on its part, to refund the money to its owner. Such a promise can be enforced by action. Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. *Moses* v. *Macferlan*, 2 Burr. 1012. Bayne & Co. are indebted to the United States, within the meaning of the fifth section of the act of Congress of March 3, 1797, 1 Stat. 515. The form of their indebtedness, or the mode in which it was incurred, is immaterial. *Lewis, Trustee*, v. *United States*, 92 U. S. 618. The government being entitled to a preference and priority of payment from the assets of its insolvent debtors, the relief in this case was, in our opinion, properly granted. *Decree affirmed.*

TAMELING v. UNITED STATES FREEHOLD AND EMIGRATION COMPANY.

The action of Congress confirming a private land claim in New Mexico, as recommended for confirmation by the surveyor-general of that Territory, is not subject to judicial review.

ERROR to the Supreme Court of the Territory of Colorado.

This is an action by the defendant in error against Tameling, to recover possession of one hundred and sixty acres of land in the County of Costilla and Territory of Colorado. The tract is situate within the exterior boundaries of a larger one, known as the "Costilla estate," which was severed from the "Sangre de Cristo grant." The latter is known and designated as "claim No. 14 of Charles Beaubien," in the letter of the Secretary of the Interior to the Speaker of the House of Representatives, bearing date Feb. 11, 1857. With that claim were transmitted copies of the grant, order of prefect's court, notice of claim, deed of administrator, testimony, and report.

The case was submitted to the District Court on the following agreed statement of facts: —

The piece or parcel of land described in the plaintiff's declaration, and for the possession of which the plaintiff brings this suit, is now, and at the time of the commencement of this suit was, situate, lying, and being in the County of Costilla, in the Territory of Colorado, and, at the time of the commencement of this suit, and for a long time prior thereto, was in the actual possession of the said defendant, who, before the commencement of said suit, has made valuable improvements thereon.

The said piece or parcel of land is within the exterior boundaries of and forms a part of a larger tract or parcel of land claimed by the plaintiff in fee-simple, and known as the "Costilla estate," which said estate is bounded as follows, viz.: "Beginning at a point one league below the confluence of the Rio Costilla and the Rio del Norte; thence up the Rio del Norte, on the eastern bank thereof, to its confluence with the Rio Culebra; thence easterly, following the southern bank of the Rio Culebra, to a point at or near the junction of the Rio Seco with the Rio Culebra; thence easterly to the Culebra Peaks; thence southerly to the boundary of the lands of Miranda and

Beaubien, and to a point at or near the road to Maxwell's; thence westerly, following the mountain-ranges and along the boundary of the lands of Miranda and Beaubien, to a point about one league south of the Rio Costilla; and thence westerly to the place of beginning: containing by estimation five hundred thousand acres, or thereabouts."

The said Costilla estate prior to the commencement of this suit formed a part and parcel of a yet larger tract or parcel of land, known as the "Sangre de Cristo grant;" from said grant the said estate was segregated by the conveyance thereof by Martin Coates Fisher to the plaintiff, which said conveyance is hereinafter referred to; and which said grant, as an entirety (including said Costilla estate), is described as follows: "Beginning at a point one Spanish league below the confluence of the Rio de Costilla and the Rio del Norte; thence up the Rio del Norte on the eastern bank thereof, to a point one league above the mouth of the Rio Trinchara; thence north-east to a point; thence along said mountain, south-east to a point established on the top of said mountain; thence south to the boundary of the lands of Miranda and Beaubien; thence along said boundary to a point about one league south of the Rio de Costilla; and thence west to the place of beginning."

The said Costilla estate is included in the Sangre de Cristo grant, whether reference be had to the description thereof given in the judicial certificate of possession, or in the petition of Charles Beaubien herein set forth.

The said Sangre de Cristo grant is known and designated as "Claim No. 14 of Charles Beaubien" in the letter of the Secretary of the Interior of the United States, transmitting a transcript of the claim of the said Beaubien to said grant, to the Hon. N. P. Banks, Speaker of the House of Representatives, said letter bearing date Feb. 11, 1857, and which said letter, and all of the documents pertaining to said Sangre de Cristo grant therein referred to, are in the words and figures following, viz.: —

"DEPARTMENT OF THE INTERIOR, Feb. 11, 1857.

"SIR, — I have the honor to transmit herewith for the action of Congress, contemplated by the eighth section of the act of 22d of July, 1854, the transcript of the land-claims in New Mexico,

designed for the House of Representatives, as per letter from the Commissioner of the General Land-Office of the 10th instant, a copy of which is enclosed.

"Similar documents, submitted by the commissioner in the same letter for the Senate of the United States, have been appropriately disposed of.

"With great respect, your obedient servant,

"R. MCCLELLAND, *Secretary.*

"Hon. N. P. BANKS,

"*Speaker of the House of Representatives.*"

"GENERAL LAND-OFFICE, Feb. 10, 1857.

"SIR, — I have the honor to submit to the department the following documents, transmitted to this office by the surveyor-general of New Mexico, with his letter dated 31st December, 1856, to wit: —

"Claim No. 14, of Charles Beaubien. Transcript for the House of Representatives, embracing copies of grant (original), translation of grant, order of prefect's court, notice of claim, deed of administrator, testimony, and report.

"Also, similar documents for the United States Senate, with the exception of another transcript of the original grant, which has not been received from the surveyor-general.

"Claim No. 29, Casa Colorado. Transcript for the House of Representatives, embracing copies of grant (original), translation of grant, notice, testimony, and report.

"Also, similar documents for the United States Senate, with the exception of another copy of original grant which has not been received from the surveyor-general.

"Claim No. 32, of Hugh Stevenson *et als.* Transcript for the House of Representatives, embracing copies of grant (original), translation of grant, testimony, map of the Bracito tract of land, deed of Francisco Gracia y San Juan to Hugh Stevenson *et al.*, deed of Hugh Stevenson *et al.* to Francisco Gracia y San Juan, notice, brief, and report.

"Also, similar documents for the United States Senate, with the exception of other original copies of grant and map of the Bracito tract of land, which have not been received from the surveyor-general.

"The foregoing three claims have been examined and approved by the surveyor-general of New Mexico, who, in transmitting the above-mentioned copies of the documents, requested that the same

may be submitted to Congress at their present session for their action upon the claims, and they are therefore accordingly herewith submitted for that purpose.

"With great respect, your obedient servant,

"THOMAS A. HENDRICKS, *Commissioner.*

"Hon. R. MCCLELLAND,

"Secretary of the Interior."

"*Claim No.* 14, *of Charles Beaubien.*

"Seal fourth. [SEAL.] Two rials.

"For the years one thousand eight hundred and forty-two and forty-three.

"Most Excellent Governor Don MANUEL ARMIJO:—

"Louis Lee, a naturalized citizen and resident of the first demarcation of Taos, and Narciso Beaubien, a citizen, and also a resident of the above-named place, appear before your Excellency in the manner and form best provided by law and most convenient to us, and state that, desiring to encourage the agriculture of the country, and place it in a flourishing condition, and being restricted with lands wherewith to accomplish said purpose, we have seen and examined with great care that embraced within the Costilla, Culebra, and Trincheras Rivers, including the Rito of the Indians and the Sangre de Cristo to its junction with the Del Norte River, and finding in it the qualities of fruitfulness, fertile lands for cultivation, and abundance of pasture and water, and all that is required for its settlement, and the raising of horned and woollen cattle, and being satisfied with it, and knowing that it is public land, we have not hesitated to apply to your Excellency, praying you, as an act of justice, to grant to us the possession of a tract of land to each one within the afore-mentioned boundaries, promising to commence the settlement of the same within the time prescribed by law, until the colony shall be established and permanently fixed, provided your Excellency be pleased to grant it to us. Such is the offer we make, and swear it is not done in malice.

"LOUIS LEE.

"NARCISO BEAUBIEN.

"SANTE FÉ, Dec. 27, 1843."

"SANTA FÉ, Dec. 30, 1843.

"Referred to the prefect, in order that, if the land petitioned for be not otherwise disposed of, he cause the possession referred to by the petitioners to be given.

"ARMIJO. [RUBRIC.]

"DONACIAÑO VIGIL [RUBRIC], *Acting Secretary.*"

"RIO ARRIBA, Jan. 7, 1844.

"The justice of the peace to whose jurisdiction belongs the land petitioned for, which, I believe, should be the third demarcation, having before him the superior decree of the most excellent governor of the 30th of December last, will proceed to the land and place the petitioners in possession, provided it is not to the injury of third parties.

"ARCHULETA. [RUBRIC.]"

"To Don MIGUEL SANCHEZ, Justice of the Peace of the Third Demarcation:—

"The undersigned, Mexican citizens and residents of this precinct, in the most approved manner provided by law, appear before you, and state that the public land contained in the foregoing statement having been granted to us by the government of the department, as will be seen by the superior decree entered on the margin, and lacking the certificate of possession which will insure to us our legal title thereto, and prevent any one from disturbing us, we pray you to consider us as having presented ourselves, after which we will enlarge this for such ends as our rights may require. Therefore, we pray you to grant our request, justice being what we ask for. We swear that it is not done in malice, and in whatever may be necessary, &c.

"LOUIS LEE.
"NARCISO BEAUBIEN.

"TAOS, Jan. 8, 1844."

"Jan. 8, 1844.

"Considered as presented, and received as far as required by law, I, the present justice, proceeding with my attending and instrumental witnesses to the place designated in the foregoing documents, and let the possession selected by the petitioners to be given, so that they, their heirs and successors, may hold the same by a just title. The citizen Miguel Sanchez, justice of the peace of the third jurisdiction of Taos, so provided, ordered, and signed, with those in his attendance. To which I certify.

"JOSÉ MIGUEL SANCHEZ. [RUBRIC.]

"Attending:—
"JUAN RAMOR VALDEZ. [RUBRIC.]
"PEDRO VALDEZ. [RUBRIC.]"

"In the pueblo of Taos, on the twelfth day of January, 1844, I, the citizen Miguel Sanchez, justice of the peace of this demarcation, by virtue of the direction contained in the foregoing decree, proceeded to the land referred to by Don Luis Lee and Don Nar-

ciso Beaubien in the foregoing instrument, and being then there with my attending and instrumental witnesses for that purpose appointed, the landmarks of the boundaries were then established according to the manner in which the land is described in the preceding petition, and corresponding with the plat which I subscribed; and, commencing on the east side of the Del Norte River, a mound was erected at one league distance from its junction with the Costilla River, thence following up the Rio del Norte, on the same eastern bank, to one league above the junction of the Trenchera River, where another mound was erected; and continuing from west to north, east, following up the current of Trinchera River to the summit of the mountain, where another mound was established; and following the summit of the mountain to the boundary of the lands of Miranda and Beaubien, the fourth mound was established; and continuing on the summit of the Sierra Madre, and following the boundary of the aforementioned lands to opposite the first mound erected, on the Del Norte River, where the fifth and last mound was erected; and from thence in a direct line to the first one erected on the north; and, being registered, I took them by the hand, walked with them, and caused them to throw earth, pull weeds, and other evidence of possession, whereupon the proceedings were concluded, the boundaries determined without any conflicting claim of any third party, as I, the aforesaid justice, in the name of the sovereignty of the nation (may God preserve it), gave to the aforementioned Don Louis Lee and Don N. Beaubien the personal and perfect possession which they solicit, serving as a title for them, their children and successors, in which I will protect and defend them; and I order them not to be deprived thereof without being first heard, and sentence given against them according to law and evidence.

"In testimony whereof, I sign with my attending and instrumental witnesses, who were Messrs. Ceram St. Vrain, Manuel Martin, and Juan Ortega, at present residents of this precinct. To which I certify.

"JOSÉ MIGUEL SANCHEZ.

"Instrumental:—

"CERAM ST. VRAIN.

"MANUEL ANTONIO MARTIN.

"JUAN ORTEGA.

"Fees: $30.

"NOTE.— The words interlined are valid. [RUBRIC.]

"Attending:—

"JUAN RAMOR VALDEZ.

"PEDRO VALDEZ."

"SURVEYOR-GENERAL'S OFFICE,
"TRANSLATOR'S DEPARTMENT, June 18, 1856.

"I, David V. Whiting, translator, certify the foregoing to be a correct translation of the original on file in this office.

"DAVID V. WHITING, *Translator.*

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in this office.

"WILLIAM PELHAM,
"*Surveyor-General of New Mexico.*"

May Term, 1847.

"DON FERNANDO DE TAOS, May 3, 1847.

"This being the regular May Term of the prefect's court, it met and was opened according to law, and, among other proceedings, the following were held. And the said Joseph Pley, administrator as aforesaid, presented the following petition to the court, in letters and figures as follows, to wit: —

"To the Honorable Judge of the Prefect Court for the County of Taos, Territory of New Mexico: —

"Your petitioner, Joseph Pley, administrator of the estate of Stephen L. Lee, deceased, respectfully represents, that the personal estate of the said Stephen L. Lee, deceased, is insufficient to pay the debts of the estate, as will appear by the account of your petitioner's administration. The list of debts due to and by the deceased remaining unpaid, and there being no other assets in the hands of your petitioner whereby to enable him to meet the demands against said estate, your petitioner therefore prays that so much of the real estate of the said deceased may be sold by order of the court as will be sufficient to pay the debts of the deceased, and that your Honor will make an order ordering your petitioner to proceed to sell all or a part of said real estate at either private or public sale, and upon such terms as to your petitioner, under the instructions of the court, may seem most beneficial to the interest of all concerned.

"JOSEPH PLEY,
"*Administrator of S. L. Lee, Deceased.*"

"DON FERNANDO DE TAOS, May 3, 1847.

"To JOSEPH PLEY, Administrator of the Estate of STEPHEN L. LEE, Deceased.

"Your petition to the prefect court within and for the county of Taos, in the Territory of New Mexico, praying to said court to

sell the real estate of Stephen L. Lee, deceased, or so much thereof as will satisfy such claims as may be presented, the court as aforesaid grants the request contained in said petition, and that you are hereby permitted to sell said real estate at private sale, at not less than the value as appraised.

"Witness, Robert Crary, clerk of the prefect court for said county, at Don Fernando de Taos, this third day of May, A.D. 1847.

"ROBERT CRARY, *Clerk.*

"Approved: VINCINTE MARTINEZ, *Prefecto.*"

"I hereby certify that the foregoing is a true copy of the record of the prefect court, on file in my office, of the May Term of said court, held in the town of Don Fernando de Taos on the first Monday of May, A.D. 1847, at which time Vincente Martinez was prefect, and Robert Crary clerk.

"Witness, Pedro Valdez, clerk of the prefect's court of the county of Taos and Territory of New Mexico, and my private seal, there being no seal for said county, Aug. 1, 1855.

"[SEAL.] PEDRO VALDEZ, *Clerk.*"

"TERRITORY OF NEW MEXICO,

"*County of Taos:*—

"I, José Benito Martinez, judge of the probate or prefect's court within and for the county of Taos, do hereby certify that Pedro Valdez, who signed the foregoing certificate, and whose signature thereto is genuine, was at the time of so doing clerk of said court.

"Given under my hand this sixth day of August, A.D. 1855.

"José BENITO MARTINEZ, *Judge of Probate.*"

"UNITED STATES OF AMERICA,

"*Territory of New Mexico, ss:*—

"I, W. W. H. Davis, secretary of the Territory of New Mexico, do hereby certify that José Benito Martinez, whose certificate is herein annexed, and who has thereto subscribed his name, was at the time of so doing a judge of probate in and for the county of Taos and Territory aforesaid, duly elected and qualified to act as such, and that the signature purporting to be his is genuine.

"In testimony, I have hereunto set my hand and affixed my seal of office the eleventh day of August, A.D. 1855.

"[SEAL.] W. W. H. DAVIS,

"*Secretary Territory of New Mexico.*"

"SURVEYOR-GENERAL'S OFFICE,
"SANTE FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in this office.

"WILLIAM PELHAM,
"*Surveyor-General of New Mexico.*"

"This indenture, made this fourth day of May, in the year of our Lord 1848, between Joseph Pley, administrator of Stephen L. Lee, deceased, of the county of Taos and Territory of New Mexico, of the first part, and Charles Beaubien, of the same county and Territory, of the second part, witnesseth: That whereas an order was entered at the January Term of the prefect's court of the county of Taos, commanding the said Joseph Pley to sell as administrator of said estate all the real estate of said deceased for the payment of debts allowed against said estate: Now, therefore, by virtue of said order, the said party of the first part, for and in consideration of the sum of $100, to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, doth hereby give, grant, bargain, sell, convey, transfer, and make over unto the said party of the second part, his heirs and assigns, for ever, all the right, title, and interest of the said Stephen L. Lee in and to the following-described tract, lot, or parcel of land: All that certain tract of land known as the Sangre de Cristo claim, and which was granted by the Mexican government to Stephen L. Lee and Narciso Beaubien, and described as follows: Beginning from a point one league below the confluence of the Rio de Costilla and the Rio del Norte; thence up the Rio del Norte, on the eastern bank, to a point one league above the mouth of the Trinchera; thence north-north-east to a point on the mountain; thence along the mountain south-east, east to an established point on the top of the mountain; thence south, along the line of the Poniete claim of Miranda and Beaubien; thence to a point about a league south of the Rio Costilla; thence west to the place of beginning; and a number of acres not known: to have and to hold the above-granted premises unto the said Charles Beaubien, his heirs and assigns, for ever. In testimony whereof, the party of the first part has hereunto set his hand and affixed his seal the day and year above written.

"[L. S.] JOSEPH PLEY,
"*Administrator of the Estate of Stephen L. Lee.*

"In presence of VITAL TRUJILLO."

"TERRITORY OF NEW MEXICO,

"*County of Taos, ss:*—

"Be it remembered that on this eleventh day of May, in the year 1848, Joseph Pley, administrator of the estate of Stephen L. Lee, who is personally known to the undersigned, clerk of the Circuit Court for said county, to be the same person whose name is subscribed to the foregoing instrument in writing, and acknowledged the same to be his act and deed, as administrator as aforesaid, for the purposes therein mentioned.

"Taken and certified the day and year above written.

"ROBERT CRARY, [SEAL]

"*Clerk of the Circuit Court.*"

"SURVEYOR-GENERAL'S OFFICE,

"SANTA FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in my office.

"WILLIAM PELHAM,

"*Surveyor-General of New Mexico.*"

"To General WILLIAM PELHAM, Surveyor-General of the Territory of New Mexico:—

"Charles Beaubien, a citizen of the United States and a resident of the Territory of New Mexico, represents that he is the legal owner, in fee, of a certain tract of land lying and being situated in the county of Taos, in said Territory of New Mexico, known as the Sangre de Cristo grant, described as follows: Beginning from a point one Spanish league below the confluence of the Rio de Costilla and the Rio del Norte; thence up the Del Norte, on the eastern bank, to a point one league above the mouth of the Rio Trinchera; thence north-east to a point on the mountain; thence along said mountain, south-east to a point established on the top of the said mountain; thence south to the boundary of the lands of Miranda and Beaubien; thence along said boundary to a point about one league south of the Rio Costilla; and thence west to the place of beginning: all of which points and boundaries are well-known landmarks, and monuments were placed at the same at the time of giving possession of the same to the original grantees. The said Charles Beaubien, the present claimant and actual owner, claims a perfect title to said lands by virtue of a grant made on the thirtieth day of December, A.D. 1843, by Manuel Armijo, governor of the department of New Mexico, and perfected according to law by possession being given by the alcalde, José Miguel Sanchez,

[illegible] 1844. Said grant was made
[illegible] regulations of the Republic of
[illegible] as will appear by refer-
[illegible] in force, and the Spanish
[illegible] government of the Republic of
[illegible] other states, that he cannot
[illegible], only so far as set forth
[illegible] and bounds, nor can he fur-
[illegible] as no survey has ever been
[illegible] the said Luis Lee and Nar-
[illegible] in lawful possession of said
[illegible] regulations in regard to the
[illegible] possession thereof until Jan.
[illegible] massacre of Taos of that date;
[illegible] of the claimant, and, according
[illegible] Narciso Beaubien, deceased, de-
[illegible] and that he claims all the right,
[illegible] Lee, deceased, by virtue of a
[illegible] Luis Lee the fourth day of May,
[illegible] herewith filed, marked 'A;' deed
[illegible] of Luis Lee, to the claimant
[illegible] of the record of the court of pro-
[illegible] authorizing the administrator to sell
[illegible] C." Claimant further states
[illegible] Luis Lee whose name appears
[illegible] Lee whose name appears
[illegible] claimant, are one and the same

[illegible] to prove, if deemed necessary,
[illegible] possession he has had made
[illegible] and that it is becoming under
[illegible] claimant therefore respect-
[illegible] his claim.

SMITH & HOUGHTON,
"Attorneys for Claimant."

"The foregoing is [illegible]
office.

[illegible] GENERAL'S OFFICE,
SANTA FÉ, Dec. 30, 1856.

[illegible] copy of the original on file in this

WILLIAM PELHAM,
"Surveyor-General of New Mexico."

"This indenture, [illegible]
our Lord 1848, betwe[illegible]
Lee, deceased, of the [illegible]
of the first part, an[illegible]
Territory, of the se[illegible]
was entered at the [illegible]
of Taos, comman[illegible]
of said estate all t[illegible]
debts allowed as [illegible]
said order, the sa[illegible]
of the sum of $1[illegible]
second part, the [illegible]
hereby give, gra[illegible]
unto the said par[illegible]
all the right, tit[illegible]
to the following
certain tract of l[illegible]
was granted by
Narciso Beaubi[illegible]
point one league
the Rio del Nort[illegible]
to a point one l[illegible]
north-north-east
mountain south-e[illegible]
mountain; thence
Miranda and Bes[illegible]
the Rio Costilla;
number of acres
premises unto th[illegible]
ever. In test[illegible]
unto

"CHARLES BEAUBIEN, SANGRE DE CRISTO.

"DONACIAÑO VIGIL, being duly sworn, was interrogated in the following manner: —

"*Question.* What office did you hold in year 1843 under the Mexican government?

"*Answer.* Acting secretary of the department of New Mexico.

"*Q.* What office did Manuel Armijo hold at that time?

"*A.* He was political governor and military commander of the department.

"*Q.* Is his signature on the grant made to Narciso Beaubien and Luis Lee to the Sangre de Christo and your own signature to said document genuine?

"*A.* They are.

"*Q.* What office did Juan Andres Archuleta hold at that time?

"*A.* He was the prefect of the northern district, and the land granted was within his district.

"*Q.* Do you know the signature of Archuleta, and is the one attached to said grant genuine?

"*A.* I do; and it is genuine.

"*Q.* Have you seen the governor and prefect sign their name?

"*A.* I have.

"*Q.* Are Stephen L. Lee and Luis Lee one and the same person, and was he as well known by one name as by the other?

"*A.* He was the same person, and was as well known by one name as by the other.

"*Q.* Did you know Narciso Beaubien, the son of the present claimant?

"*A.* I did; and he and Lee were both killed at the massacre of Taos in the year 1847.

"*Q.* Did Narciso Beaubien have any children?

"*A.* He did not; he was sixteen years old when he was killed.

"*Q.* Have you any interest in this claim?

"*A.* I have not.

"*Q.* Do you know who was the prefect of Taos County in the year 1847, after the massacre?

"*A.* I was acting governor and secretary at that time, and Vincinte Martinez was appointed by me to fill that office.

"*Q.* Is your signature to the registry of said document genuine, and in what capacity did you sign?

"*A.* It is; and signed as secretary and recorder of land-titles under the Harney code.

"DONACIAÑO VIGIL."

on the twelfth day of January, A.D. 1844. Said grant was made according to the usage and laws and customs of the Republic of Mexico, to Luis Lee and Narciso Beaubien, as will appear by reference to said laws and usages, at that time in force, and the Spanish laws, so far as recognized by the government of the Republic of Mexico. The said Charles Beaubien further states, that he cannot show the quantity of land claimed by him, only so far as set forth by the foregoing description of points and bounds, nor can he furnish a plat of the survey of the same, as no survey has ever been made. The claimant further states that the said Luis Lee and Narciso Beaubien, after having been put in lawful possession of said grant, conformed to all the laws and regulations in regard to the same as required at that time, and held possession thereof until Jan. 19, 1847, when both were slain in the massacre of Taos of that date; that Narciso Beaubien was the son of the claimant, and, according to law, all the interest of the said Narciso Beaubien, deceased, descends to the present claimant, and that he claims all the right, title, and interest of the said Luis Lee, deceased, by virtue of a deed made by the administrator of Luis Lee the fourth day of May, 1848. Said original grant is herewith filed, marked 'A;' deed from Joseph Pley, administrator of Luis Lee, to the claimant marked 'B,' also certified copy of the record of the court of probate for said county of Taos, authorizing the administrator to sell said right, title, and interest, marked 'C.' Claimant further states that he is prepared to prove that the Luis Lee whose name appears in the original grant, and the Stephen L. Lee whose name appears in the administrator's deed to the claimant, are one and the same person.

"Claimant is prepared further to prove, if deemed necessary, that since the said grant came into his possession he has had made extensive settlements on the same, and that it is becoming under his ownership rapidly populated. The claimant therefore respectfully asks a speedy acknowledgment of his claim.

"SMITH & HOUGHTON,
"*Attorneys for Claimant.*"

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in this office.

"WILLIAM PELHAM,
"*Surveyor-General of New Mexico.*"

"CHARLES BEAUBIEN, SANGRE DE CRISTO.

"DONACIAÑO VIGIL, being duly sworn, was interrogated in the following manner:—

"*Question.* What office did you hold in year 1843 under the Mexican government?

"*Answer.* Acting secretary of the department of New Mexico.

"*Q.* What office did Manuel Armijo hold at that time?

"*A.* He was political governor and military commander of the department.

"*Q.* Is his signature on the grant made to Narciso Beaubien and Luis Lee to the Sangre de Christo and your own signature to said document genuine?

"*A.* They are.

"*Q.* What office did Juan Andres Archuleta hold at that time?

"*A.* He was the prefect of the northern district, and the land granted was within his district.

"*Q.* Do you know the signature of Archuleta, and is the one attached to said grant genuine?

"*A.* I do; and it is genuine.

"*Q.* Have you seen the governor and prefect sign their name?

"*A.* I have.

"*Q.* Are Stephen L. Lee and Luis Lee one and the same person, and was he as well known by one name as by the other?

"*A.* He was the same person, and was as well known by one name as by the other.

"*Q.* Did you know Narciso Beaubien, the son of the present claimant?

"*A.* I did; and he and Lee were both killed at the massacre of Taos in the year 1847.

"*Q.* Did Narciso Beaubien have any children?

"*A.* He did not; he was sixteen years old when he was killed.

"*Q.* Have you any interest in this claim?

"*A.* I have not.

"*Q.* Do you know who was the prefect of Taos County in the year 1847, after the massacre?

"*A.* I was acting governor and secretary at that time, and Vincinte Martinez was appointed by me to fill that office.

"*Q.* Is your signature to the registry of said document genuine, and in what capacity did you sign?

"*A.* It is; and signed as secretary and recorder of land-titles under the Harney code.

"DONACIAÑO VIGIL."

on the twelfth day of January, A.D. 1844. Said grant was made according to the usage and laws and customs of the Republic of Mexico, to Luis Lee and Narciso Beaubien, as will appear by reference to said laws and usages, at that time in force, and the Spanish laws, so far as recognized by the government of the Republic of Mexico. The said Charles Beaubien further states, that he cannot show the quantity of land claimed by him, only so far as set forth by the foregoing description of points and bounds, nor can he furnish a plat of the survey of the same, as no survey has ever been made. The claimant further states that the said Luis Lee and Narciso Beaubien, after having been put in lawful possession of said grant, conformed to all the laws and regulations in regard to the same as required at that time, and held possession thereof until Jan. 19, 1847, when both were slain in the massacre of Taos of that date; that Narciso Beaubien was the son of the claimant, and, according to law, all the interest of the said Narciso Beaubien, deceased, descends to the present claimant, and that he claims all the right, title, and interest of the said Luis Lee, deceased, by virtue of a deed made by the administrator of Luis Lee the fourth day of May, 1848. Said original grant is herewith filed, marked 'A;' deed from Joseph Pley, administrator of Luis Lee, to the claimant marked 'B,' also certified copy of the record of the court of probate for said county of Taos, authorizing the administrator to sell said right, title, and interest, marked 'C.' Claimant further states that he is prepared to prove that the Luis Lee whose name appears in the original grant, and the Stephen L. Lee whose name appears in the administrator's deed to the claimant, are one and the same person.

"Claimant is prepared further to prove, if deemed necessary, that since the said grant came into his possession he has had made extensive settlements on the same, and that it is becoming under his ownership rapidly populated. The claimant therefore respectfully asks a speedy acknowledgment of his claim.

"SMITH & HOUGHTON,
"*Attorneys for Claimant.*"

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in this office.

"WILLIAM PELHAM,
"*Surveyor-General of New Mexico.*"

"CHARLES BEAUBIEN, SANGRE DE CRISTO.

"DONACIAÑO VIGIL, being duly sworn, was interrogated in the following manner:—

"*Question.* What office did you hold in year 1843 under the Mexican government?

"*Answer.* Acting secretary of the department of New Mexico.

"*Q.* What office did Manuel Armijo hold at that time?

"*A.* He was political governor and military commander of the department.

"*Q.* Is his signature on the grant made to Narciso Beaubien and Luis Lee to the Sangre de Christo and your own signature to said document genuine?

"*A.* They are.

"*Q.* What office did Juan Andres Archuleta hold at that time?

"*A.* He was the prefect of the northern district, and the land granted was within his district.

"*Q.* Do you know the signature of Archuleta, and is the one attached to said grant genuine?

"*A.* I do; and it is genuine.

"*Q.* Have you seen the governor and prefect sign their name?

"*A.* I have.

"*Q.* Are Stephen L. Lee and Luis Lee one and the same person, and was he as well known by one name as by the other?

"*A.* He was the same person, and was as well known by one name as by the other.

"*Q.* Did you know Narciso Beaubien, the son of the present claimant?

"*A.* I did; and he and Lee were both killed at the massacre of Taos in the year 1847.

"*Q.* Did Narciso Beaubien have any children?

"*A.* He did not; he was sixteen years old when he was killed.

"*Q.* Have you any interest in this claim?

"*A.* I have not.

"*Q.* Do you know who was the prefect of Taos County in the year 1847, after the massacre?

"*A.* I was acting governor and secretary at that time, and Vincinte Martinez was appointed by me to fill that office.

"*Q.* Is your signature to the registry of said document genuine, and in what capacity did you sign?

"*A.* It is; and signed as secretary and recorder of land-titles under the Harney code.

"DONACIAÑO VIGIL."

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"SMITH & HOUGHTON,
"*Attorneys for Claimant.*"

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in this office.

"WILLIAM PELHAM,
"*Surveyor-General of New Mexico.*"

"CHARLES BEAUBIEN, SANGRE DE CRISTO.

"DONACIAÑO VIGIL, being duly sworn, was interrogated in the following manner:—

"*Question.* What office did you hold in year 1843 under the Mexican government?

"*Answer.* Acting secretary of the department of New Mexico.

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"*Q.* Have you seen the governor and prefect sign their name?

"*A.* I have.

"*Q.* Are Stephen L. Lee and Luis Lee one and the same person, and was he as well known by one name as by the other?

"*A.* He was the same person, and was as well known by one name as by the other.

"*Q.* Did you know Narciso Beaubien, the son of the present claimant?

"*A.* I did; and he and Lee were both killed at the massacre of Taos in the year 1847.

"*Q.* Did Narciso Beaubien have any children?

"*A.* He did not; he was sixteen years old when he was killed.

"*Q.* Have you any interest in this claim?

"*A.* I have not.

"*Q.* Do you know who was the prefect of Taos County in the year 1847, after the massacre?

"*A.* I was acting governor and secretary at that time, and Vincinte Martinez was appointed by me to fill that office.

"*Q.* Is your signature to the registry of said document genuine, and in what capacity did you sign?

"*A.* It is; and signed as secretary and recorder of land-titles under the Harney code.

"DONACIAÑO VIGIL."

"Sworn and subscribed to before me this third day of December, 1856.

"WILLIAM PELHAM."

"JOAB HOUGHTON, sworn: —

"*Question.* State if you knew Narciso Beaubien.

"*Answer.* I did.

"*Q.* State if he was the son of Charles Beaubien, the present claimant?

"*A.* He was so considered by his father and mother.

"*Q.* Did you know Stephen L. Lee, and how long did you know him?

"*A.* I knew him from 1843 up to the time of his death.

"*Q.* State what the 'L' in his name stood for?

"*A.* It stood for Louis, and sometimes he signed Stephen Louis Lee, but generally Stephen L. Lee; and he was often known among the Mexicans by Louis Lee, or Stephen L. Lee.

"*Q.* Are Lee and Narciso Beaubien alive now?

"*A.* They are both dead.

"*Q.* How did they come to their death?

"*A.* They were killed in the massacre of Taos, on the 19th of January, 1847.

"*Q.* Do you know if Narciso Beaubien had any children at the time of his death?

"*A.* He had not. He was a minor, and could not have been more than sixteen years of age at the time of his death.

"*Q.* Do you know the signature of Pedro Valdez, attached to the transcript of the record of the court, and is it genuine?

"*A.* I do. He was clerk of the probate court, and I saw him sign the transcript referred to.

"*Q.* Do you know the signature of José Benito Martinez, attached to the document mentioned?

"*A.* I do; and saw him sign the certificate that Pedro Valdez was clerk of his court.

"*Q.* Do you know the signature of Joseph Pley, administrator of Stephen L. Lee, attached to the conveyance to Charles Beaubien?

"*A.* I do; and have been long acquainted with his signature, and have often seen him sign.

"*Q.* Do you know the residence of Vidal Trujillo, subscribing witness to said conveyance?

"*A.* I understand he resides at Ruyado, over one hundred miles from this place (Santa Fé).

"*Q.* Do you know the signature of Robert Crary, appended to the same document?

"*A.* I do; it is his signature, and I know he was clerk of the Circuit Court at that date.

"*Q.* Were you at that time chief justice of this Territory?

"*A.* I was.

"J. HOUGHTON."

"Sworn to and subscribed before me this third day of December, 1856.

"WILLIAM PELHAM."

"MANUEL MARTINEZ, sworn:—

"*Question.* Do you know José Miguel Sanchez, the justice of the peace whose signature is affixed to the certificate of possession in this case?

"*Answer.* I have known him since I have had the use of reason.

"*Q.* Do you know his signature, and have you seen him sign?

"*A.* I know his signature, and have seen him sign frequently.

"*Q.* Is his signature appended to the foregoing document genuine?

"*A.* It is.

"*Q.* Is José Miguel Sanchez dead, and when did he die?

"*A.* He died in the month of June of the present year.

"MANUEL MARTINEZ."

"Sworn to and subscribed before me this fourth day of December, 1856.

"W. H. PELHAM, *Surveyor-General.*"

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, Dec. 30, 1856.

"The foregoing is a true copy of the original on file in this office.

"WILLIAM PELHAM, *Surveyor-General.*"

"CHARLES BEAUBIEN, Assignee of STEPHEN L. LEE and NARCISO BEAUBIEN, Deceased, *v.* THE UNITED STATES. } *Sangre de Cristo grant.*

"The above case was set for trial on the third day of December, 1856.

"On the twenty-seventh day of December, 1843, Luis Lee and Narciso Beaubien petitioned Manuel Armijo, civil and military governor of New Mexico, for a grant of land in what is now the county

of Taos, 'embracing the Costilla, Culebra, and Trinchera Rivers, including the Rito of the Indians, and Sangre de Cristo, to its junction with the Del Norte River.' This petition was referred, on the thirtieth day of December, 1843, by Manuel Armijo, the civil and military governor aforementioned, to the prefect, with instructions to give the possession asked for by the petitioners in case there was no impediment.

"On the 7th of January, 1844, Juan Andres Archuletta, the prefect, directed the justice of the peace of the demarcation wherein the land was situated to place the parties in possession, in accordance with the decree of the civil and military governor, by virtue of which the justice of the peace, José Miguel Sanchez, placed the parties in possession of the land, with the boundaries contained in the petition, vesting in them, their children and successors, a title in fee to said lands.

"Narciso Beaubien, one of the grantees, was killed at the massacre of Taos, in the year 1847; and, dying without issue, his father, Charles Beaubien, the present claimant, became the heir of one undivided half of the land granted, and purchased the remaining undivided half from Joseph Pley, administrator of the estate of Stephen L. Lee, who was killed at the same time and place as Narciso Beaubien.

"The genuineness of the signatures of the granting officers and the signature of Joseph Pley, administrator of the estate of Stephen L. Lee, are proven by the testimony of competent witnesses. The signature of the clerk of the Probate Court, attached to a transcript of the record of the court ordering the sale of the property of Stephen L. Lee, deceased, is also proved to be genuine. It is also proven that Stephen L. Lee and Luis Lee, assigned in the original petition, were one and the same individual, and that Narciso Beaubien, the son of Charles Beaubien, the present claimant, died without issue. The testimony also shows that the land has been occupied from the time the grant was made up to the present day.

"The supreme authorities of the remote province of New Spain, afterwards the Republic of Mexico, exercised from time immemorial certain prerogatives and powers, which, although not positively sanctioned by congressional enactments, were universally conceded by the Spanish and Mexican governments; and there being no evidence that these prerogatives and powers were revoked or repealed by the supreme authorities, it is to be presumed that the exercise of them was lawful. The subordinate authorities of the provinces implicitly obeyed these orders of the governors, which were continued

for so long a period until they became the universal custom or unwritten law of the land, wherein they did not conflict with any subsequent congressional enactment. Such is the principle sanctioned by the Supreme Court of the United States, as expressed in the case of *Fremont* v. *The United States*, 17 How. 542, which decision now governs all cases of a similar nature.

"The grant being a positive one, without any subsequent conditions attached, and made by a competent authority, and having been in the possession and occupancy of the grantees and their assigns from the time the grant was made, it is the opinion of this office that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant is therefore approved by this office and transmitted to the proper department, with the recommendation that it be confirmed by the Congress of the United States.

"WILLIAM PELHAM, *Surveyor-General*

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, N. M., Dec. 30, 1856.

"SURVEYOR-GENERAL'S OFFICE,
"SANTA FÉ, N. M., Dec. 31, 1856.

"The foregoing is a true copy of the original on file in this office.
"WILLIAM PELHAM, *Surveyor-General.*"

Narciso Beaubien, the co-grantee with Stephen L. Lee (*alias* Luis Lee), of said claim No. 14, died in the year 1847, without issue, whereby his father, the said Charles Beaubien, became the sole heir of whatever interest the deceased had in said land-grant or claim; that in the year aforesaid the said Lee also died; that afterwards, and on the fourth day of May, in the year 1848, the said Charles Beaubien acquired the interest of the said Lee in said land-grant, by a purchase and conveyance thereof in due form of law, from the administrator of the estate of the said Lee; that the said Charles Beaubien had and possessed all of the rights, titles, and interests, both in law and equity, in said grant, which, by the proceedings above set forth and referred to in the aforesaid letter of the Secretary of the Interior, were vested in the said Narciso Beaubien and the said Stephen L. Lee, at the time of their death as aforesaid.

The said Charles Beaubien retained his aforesaid interest in said grant until after the passage and approval of a certain act

of the Congress of the United States, entitled "An Act to confirm certain private land-claims in the Territory of New Mexico," approved June 21, 1860.

The claim designated in said act of Congress as claim No. 14 is the claim of the said Charles Beaubien to that tract of land hereinbefore described by its boundaries, and herein designated as the "Sangre de Cristo grant," and which tract of land includes the said "Costilla estate."

After the passage and approval of the said act of Congress, and on the seventh day of April, 1864, the right, title, and interest of the said Charles Beaubien in and to the said Sangre de Cristo grant, otherwise the said claim No. 14, was absolutely conveyed and vested in Hon. William Gilpin; and thereafter and prior to the fourteenth day of July, 1870, the said Gilpin conveyed the right, title, and interest in said grant by him so derived to one Morton Coates Fisher; that thereafter, and on the day and year last aforesaid, the said Morton Coates Fisher absolutely conveyed to the plaintiffs his right, title, and interest derived as aforesaid in and to that part and portion of the said grant or claim No. 14, generally known and herein designated as the "Costilla estate," the boundaries of which said estate, as taken from the said conveyance thereof, are hereinbefore given, and include the piece or parcel of land described in the plaintiff's declaration, and the possession of which is in controversy in this suit.

The said plaintiff has not conveyed or granted his title derived as aforesaid to the piece or parcel of land described in the declaration in this cause, nor the right of the possession thereof, to the defendant or other person; but has claimed the title to and possession of said land ever since the conveyance as aforesaid by the said Fisher to the plaintiff.

If the facts aforesaid, under the law, show that the plaintiff is entitled to the possession of the land described in the declaration in this case, then the finding of the court shall be for the plaintiff; if the said facts under the law show that the plaintiff is not entitled to such possession, then the finding of the court shall be for the defendant; and upon the finding of the court the proper judgment in ejectment for the plaintiff, or for the defendant, as the case may be, shall be entered of record in said court.

Judgment was rendered in favor of the plaintiff. It was affirmed by the Supreme Court of the Territory, and Tameling sued out this writ of error.

Argued by *Mr. John A. Wills* for the plaintiff in error, and by *Mr. Matt. H. Carpenter* and *Mr. W. W. MacFarland* for the defendant in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The determination of this case depends upon the effect of the act of Congress "to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860. 12 Stat. 71. Did the act confirm the Sangre de Cristo grant to the extent of the exterior boundaries of the claim? If it did, the judgment below must be affirmed. If it did not, inasmuch as no specific portion of the land within those boundaries was severed from the remainder and confirmed to the claimant, the plaintiff below, who derives title under him, has not shown a right to the demanded premises, and the judgment must be reversed.

We have repeatedly held that individual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction. They were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government. In discharging it, Congress required that all titles to real property in California, whether inchoate or consummate, should undergo judicial examination. If a party failed to avail himself within a prescribed time of the provisions of the act of March 3, 1851, and prosecute his claim thereunder, it was completely barred, and the land covered by it reverted to the public domain. The California land-claims disposed of in this court were asserted in a direct proceeding against the United States. It became our duty, as it had been that of the board of commissioners and of the District Court, to decide on their validity, upon the documentary and other evidence incorporated in the

record. We were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of this court, as far as they were applicable. Were we now exercising appellate jurisdiction over the proceedings of a court or officer specially appointed to determine the validity and extent of the grant in question, it would be our duty to either affirm or reverse the decision, pursuant to the rules prescribed for our guidance. But Congress legislated otherwise for the adjustment of land-claims in New Mexico. By the eighth section of the act of 1854, 10 Stat. 308, the duty of ascertaining their origin, nature, character, and extent was expressly enjoined upon the surveyor-general of that Territory. He was empowered for that purpose to issue notices, summon witnesses, administer oaths, and perform all necessary acts in the premises. He was directed to make a full report, with his decision, as to the validity or invalidity of each claim, under the laws, usages, and customs of the country before its cession to the United States. That report, according to a form to be prescribed by the Secretary of the Interior, was to be laid before Congress for such action as might be deemed just and proper.

It will thus be seen that the modes for the determination of land-claims of Spanish or Mexican origin were radically different. Where they embraced lands in California, a procedure, essentially judicial in its character, was provided, with the right of ultimate appeal by either the claimant or the United States to this court. No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor-general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum.

It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor-general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action. We need only say that he distinctly sets forth that Luis Lee and Narciso Beaubien, Sept. 27,

1843, petitioned the then civil and military governor of New Mexico "for a grant of land in what is now the county of Taos, embracing the Costilla, Culebra, and Trinchera Rivers, including the Rito of the Indians, and Sangre de Cristo to its junction with the Del Norte River;" that the petition was referred by the governor to the prefect, with instructions to give the possession asked for by the petitioners; that they were put in possession with the boundaries contained in the petition, "vesting in them, their children and successors, a title in fee to said lands." After stating that, by the death of one of the grantees, his heir-at-law, Charles Beaubien, inherited the undivided half of the land, and that he acquired the remainder from the administrator of the other grantee, the surveyor-general reaches the conclusion that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant was approved, and recommended for confirmation by Congress.

Congress acted upon the claim "as recommended for confirmation by the surveyor-general." The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract.

The plaintiff in error insists that, under the Mexican colonization laws in force when the grant was made, not more than eleven square leagues for each petitioner could be lawfully granted. As there were in the present instance but two petitioners, and the land within the boundaries in question is largely in excess of that quantity, the invalidity of the grant has been earnestly and elaborately pressed upon our attention. This was matter for the consideration of Congress; and we deem ourselves concluded by the action of that body. The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal. In *Ryan et al.* v. *Carter et al.*, *supra*, p. 78, we recognized and enforced, as the settled doctrine of this court, that such an act passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to law.

Judgment affirmed.

HERVEY ET AL. v. RHODE ISLAND LOCOMOTIVE WORKS.

1. The doctrine announced in *Green* v. *Van Buskirk*, 5 Wall. 307, id. 139, — that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law of that State rather than the law of the jurisdiction where the owner lives, — reaffirmed.
2. The real owner of personal property, who vests another, to whom it is delivered, with an interest therein, must, if desirous of preserving a lien on it in Illinois, comply with the requirements of the chattel-mortgage act of that State.
3. Where personal property has been sold and delivered, secret liens, which treat the vendor as its owner until the payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the vendee holding the possession.
4. Nor is the transaction changed by the agreement assuming the form of a lease. The courts look to the purpose of the parties; and, if that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the vendee who is in possession of it.

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

On the twenty-first day of August, 1871, the Rhode Island Locomotive Works entered into a contract with J. Edwin Conant & Co., as follows: —

"This agreement, made this twenty-first day of August, 1871, by and between the Rhode Island Locomotive Works of Providence, R. I., party of the first part, and J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co., party of the second part, witnesseth:

"That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Alfred N. Smyser, No. 3; and whereas the said party of the second part is desirous of using and eventually purchasing the same: now, therefore, in consideration of the sum of one dollar to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of

the second part agrees to have and take from the said party of the first part, the said one locomotive-engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner in transacting the business of the said railroad; and in consideration thereof the said party of the second part hereby covenants and agrees to pay to the said party of the first part for the use and rent of the same the sum of $12,093.96 in notes, as follows: —

10% cash	$1,150.00
One note due Feb. 24, 1872	3,580.16
One „ „ May 24, 1872	3,647.90
One „ „ Aug. 24, 1872	3,715.90
	$12,093.96

"And the said party of the second part hereby further covenants and agrees, during the time hereby demised, to keep and maintain the said one locomotive-engine and tender in as good condition as it now is, reasonable and ordinary wear and tear excepted; but it is understood and agreed, that any injury by collision, by running off the track, or by fire, or by destruction from any cause, is not to be considered reasonable and ordinary wear and tear.

"And the said party of the first part, in consideration of the foregoing, further covenants and agrees, that in case said party of the second part shall pay the said notes promptly, as hereinbefore set forth, upon payment of the last-mentioned note, viz., $3,715.90, and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is, to have and to hold the same to the said party of the second part, its legal representatives, successors, and assigns for ever. And the said party of the second part further covenants and agrees, that if it shall fail to make any of the said payments when due, then the said party of the first part shall be at liberty, and it shall be lawful for it, to enter upon and take possession of the said one locomotive-engine and tender, and to that end to enter upon the road and other property of said party of the second part.

"And the said party of the second part further covenants and agrees, that, in case of any default on its part in any of the payments, as hereinbefore provided, it will, within thirty days thereafter, deliver the said one locomotive-engine and tender to the said party of the first part.

"And the said party of the first part shall thereafter, upon thirty days' written notice to the said party of the second part of the times and place of sale, proceed to sell the said one locomotive-engine and tender, and shall apply the proceeds of such sales, first, to the payment of the expenses of the sale; second, to the payment of any balance then due, or thereafter to become due, for or on account of the rent, as hereinbefore provided; and, if after these payments there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

"And the said party of the second part further covenants and agrees, that they will not in any way exercise or claim the right to release, incumber, or in any way dispose of said one locomotive-engine and tender, or employ them during the term of this lease in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company, or in any way or manner interfere with the said party of the first part in repossessing and retaking said one locomotive-engine and tender, should default be made in any of the hereinbefore provided for payments, but the full legal right and title of said one locomotive-engine and tender shall and does remain in the Rhode Island Locomotive Works, as fully, to all intents and purposes, as though the lease had not been made.

"And the said party of the first part hereby covenants and agrees, that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the times hereinbefore specified, without any let or hindrance or delay whatever as to any or either of said payments, that upon the last-mentioned payment, viz., $3,715.90, and all renewals being made, as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive-engine and tender to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall *ipso facto*, by the completion of such payment, vest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company.

"In witness whereof, the parties hereto have hereunto set the corporate seal, by the respective officers duly authorized.

"RHODE ISLAND LOCOMOTIVE WORKS.
"EDW. P. MASON, *Treasurer.*
"J. EDWIN CONANT & Co.,
Contractors C. & Ill. So. R.R."

{SEAL RHODE ISLAND LOCOMOTIVE WORKS, PROVIDENCE, R. I.}

Which agreement was indorsed as follows: —

"STATE OF ILLINOIS, CUMBERLAND COUNTY:

"I hereby certify that the within instrument was filed in this office for record on the twenty-eighth day of January, 1873, at two o'clock P.M., and duly recorded in book D of mortgages, page 485, and examined.

"ANDREW CARSON,
"Clerk and Ex-Officio Recorder."

It was admitted that the agreement was executed at its place of business, in Rhode Island, by the Rhode Island Locomotive Works, and in New York by Conant & Co., where they resided; that Conant & Co. paid no part of the principal of the purchase-money, except the amount admitted on the face of the agreement; and that they obtained possession of said engine and its tender under said agreement, and took it to Illinois.

On the 28th of October, 1871, by virtue of a writ of attachment issued out of the Court of Common Pleas of Coles County, Illinois, in an action of assumpsit wherein Conant & Co. were defendants, the sheriff seized the Smyser as their property, and sold it to the plaintiff in error, Hervey.

On the 29th of January, 1873, the marshal of the United States for the southern district of Illinois took possession of the Smyser under a writ of replevin sued out of the Circuit Court of the United States for that district by the Rhode Island Locomotive Works against Hervey, and the Paris and Decatur Railroad Company.

At the trial, the court below found a special verdict as follows: —

That the lease offered in evidence by plaintiff was a subsisting executory contract between the parties thereto.

That the plaintiff had not parted with the legal possession of the locomotive in controversy.

That the plaintiff had never received payment for the locomotive in controversy other or further than as stated in the face of their lease.

That the plaintiff delivered to Conant & Co. the said locomotive to be used by them in Illinois, and that said locomotive was so used in that State.

of the Congress of the United States, entitled "An Act to confirm certain private land-claims in the Territory of New Mexico," approved June 21, 1860.

The claim designated in said act of Congress as claim No. 14 is the claim of the said Charles Beaubien to that tract of land hereinbefore described by its boundaries, and herein designated as the "Sangre de Cristo grant," and which tract of land includes the said "Costilla estate."

After the passage and approval of the said act of Congress, and on the seventh day of April, 1864, the right, title, and interest of the said Charles Beaubien in and to the said Sangre de Cristo grant, otherwise the said claim No. 14, was absolutely conveyed and vested in Hon. William Gilpin; and thereafter and prior to the fourteenth day of July, 1870, the said Gilpin conveyed the right, title, and interest in said grant by him so derived to one Morton Coates Fisher; that thereafter, and on the day and year last aforesaid, the said Morton Coates Fisher absolutely conveyed to the plaintiffs his right, title, and interest derived as aforesaid in and to that part and portion of the said grant or claim No. 14, generally known and herein designated as the "Costilla estate," the boundaries of which said estate, as taken from the said conveyance thereof, are hereinbefore given, and include the piece or parcel of land described in the plaintiff's declaration, and the possession of which is in controversy in this suit.

The said plaintiff has not conveyed or granted his title derived as aforesaid to the piece or parcel of land described in the declaration in this cause, nor the right of the possession thereof, to the defendant or other person; but has claimed the title to and possession of said land ever since the conveyance as aforesaid by the said Fisher to the plaintiff.

If the facts aforesaid, under the law, show that the plaintiff is entitled to the possession of the land described in the declaration in this case, then the finding of the court shall be for the plaintiff; if the said facts under the law show that the plaintiff is not entitled to such possession, then the finding of the court shall be for the defendant; and upon the finding of the court the proper judgment in ejectment for the plaintiff, or for the defendant, as the case may be, shall be entered of record in said court.

Judgment was rendered in favor of the plaintiff. It was affirmed by the Supreme Court of the Territory, and Tameling sued out this writ of error.

Argued by *Mr. John A. Wills* for the plaintiff in error, and by *Mr. Matt. H. Carpenter* and *Mr. W. W. MacFarland* for the defendant in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The determination of this case depends upon the effect of the act of Congress "to confirm certain private land claims in the Territory of New Mexico," approved June 21, 1860. 12 Stat. 71. Did the act confirm the Sangre de Cristo grant to the extent of the exterior boundaries of the claim? If it did, the judgment below must be affirmed. If it did not, inasmuch as no specific portion of the land within those boundaries was severed from the remainder and confirmed to the claimant, the plaintiff below, who derives title under him, has not shown a right to the demanded premises, and the judgment must be reversed.

We have repeatedly held that individual rights of property, in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction. They were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government. In discharging it, Congress required that all titles to real property in California, whether inchoate or consummate, should undergo judicial examination. If a party failed to avail himself within a prescribed time of the provisions of the act of March 3, 1851, and prosecute his claim thereunder, it was completely barred, and the land covered by it reverted to the public domain. The California land-claims disposed of in this court were asserted in a direct proceeding against the United States. It became our duty, as it had been that of the board of commissioners and of the District Court, to decide on their validity, upon the documentary and other evidence incorporated in the

with the intention of sale have voluntarily parted with possession. But this principle does not apply to sales on condition, and where the original owners have never consented to the transfer of the property."

Bundage v. *Camp*, 21 Ill. 330, is also relied upon in *Murch* v. *Wright*, as authority for the conclusion there reached. Yet in that case the court say, "This is a case where the plaintiff, with the intention of selling, or changing the title, parted with the possession, relying on the vendee to give a second note at a future day, and is like in its principle to the case of 13 id. 613."

In *McCormick* v. *Hadden*, 37 Ill. 370, horses had been sold by one brother to another, with the agreement that a chattel mortgage should be made by the latter for the purchase-money. The mortgage was not made. The vendee, after the lapse of a year, mortgaged the horses to a third party. The very fact that he was to execute a mortgage was evidence that the title was intended to pass to him from the beginning; and it might well be held that the vendor, by not taking a mortgage for such a length of time, had waived the condition, and looked to the credit of the vendee for the purchase-money.

Ketchum v. *Watson*, 24 Ill. 591, does not support the doctrine of *Murch* v. *Wright*. An absolute sale was there made with delivery. The purchaser could not pay, so a resale was made, but not a redelivery. The property, as to third parties, was held to remain in the first purchaser.

It is thus shown that the rule was not settled in Illinois at the time when this agreement was made; for *Murch* v. *Wright*, ill considered as it was, and in conflict with the very cases relied upon to support it, cannot be regarded as settling the law. It requires something more than this to change the relations of parties lawfully created in other States. The defendant in error, residing in Rhode Island, cannot be held guilty of violating the policy of Illinois, with respect to a mere rule of commercial law. This court, while paying all respect to State courts as to matters peculiarly within their jurisdiction, will settle the principles of the common law and of the law of commerce for itself. As to the effect of the condi-

tional sale being as we contend, the weight of authority is overwhelming.

Chancellor Kent says, vol. ii. p. 497, "When there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery until he perform the condition."

Hilliard on Sales lays down the same rule, vol. iii. sect. 2.

It is admitted by the Supreme Court of Illinois that such an agreement is good between the parties. The authorities are quite as numerous that it is good against everybody. *Patton* v. *McCave*, 15 B. Mon. (Ky.) 555; *Tomlinsons* v. *Collins*, 20 Conn. 364, 2 Pick. (Mass.) 512, and 4 id. 449; *Reed* v. *Upton*, 9 id. 156; *Haven* v. *Emory*, 33 N. H. 66; *Sargeant* v. *Gile*, 8 id. 325; *Porter* v. *Pettingall*, 12 id. 299; *Buckmaster* v. *Smith*, 22 Vt. 203; *Armington* v. *Houston*, 38 id. 448; *Strong* v. *Taylor*, 2 Hill (N. Y.), 326; *Little* v. *Page*, 44 Mo. 412; *Forbes* v. *Marsh*, 15 Conn. 384; *Ballard* v. *Boguett*, 47 Barb. 648; *Whitney* v. *Eaton*, 15 Gray (Mass.), 225; *Bucher* v. *Hall*, 15 Iowa, 277; *Humble* v. *Ackly*, 12 id. 27; 1 Parsons on Contracts, 441; Story on Sales, sect. 313; *Sambling* v. *Read*, 1 Miss. 281; *Copeland* v. *Barrett*, 4 Wash. 594; *Gayler* v. *Dyer*, 5 Cranch, C. C. 461; *In re Lyon*, 4 Chicago Legal News, 421.

MR. JUSTICE DAVIS delivered the opinion of the court.

It was decided by this court, in *Green* v. *Van Buskirk*, 5 Wall. 307, 7 id. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the

laws and policy of the latter State conflict with those of the former.

The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the Chattel-Mortgage Act. R. S. Ill. 1874, 711, 712. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien on the property, must be recorded, whether the party to it be a resident or non-resident of the State. If this be not done, the instrument, so far as third persons are concerned, has no validity.

Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick* v. *Hadden*, 37 Ill. 370; *Ketchum* v. *Watson*, 24 id. 591. Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the purchaser who is in possession of it. This was held in *Murch* v. *Wright*, 46 id. 488. In that case the purchaser took from the seller a piano at the price of $700. He paid $50 down, which was called rent for the first month, and agreed to pay, as rent, $50 each month, until the whole

amount should be paid, when he was to own the piano. The court held, "that it was a mere subterfuge to call this transaction a lease," and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his instalments, — a contract legal and valid as between the parties, but subjecting the vendor to lose his lien in case the property, while in possession of the purchaser, should be levied upon by his creditors. That case and the one at bar are alike in all essential particulars.

The engine Smyser, the only subject of controversy in this suit, was sold on condition that each and all of the instalments should be regularly paid, with a right of rescission on the part of the vendor in case of default in any of the specified payments.

It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in *Murch* v. *Wright*, *supra*. There the price of the piano was to be paid in thirteen months, and here, that of the engine, $12,093.96, in one year. It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment? In both cases, the stipulated price of the property was to be paid in short instalments, and no words employed by the parties can have the effect of changing the true nature of the contracts. In the case at bar the agreement contemplated that the engine should be removed to the State of Illinois, and used by Conant & Co., in the prosecution of their business as constructors of a railroad. It was accordingly taken there and put to the use for which it was purchased; but while in the possession of Conant & Co., who exercised complete ownership over it, it was seized and sold, in the local courts of Illinois, as their property. These proceedings were valid in the jurisdiction where they took place, and must be respected by the Federal tribunals.

The Rhode Island Locomotive Works took the risk of losing its lien in case the property, while in the possession of Conant & Co., should be levied on by their creditors, and it cannot

complain, as the laws of Illinois pointed out a way to preserve and perfect its lien.

By stipulation the judgment of the court below is affirmed as to the locomotive Olney, No. 1.

As to the locomotive and tender called Alfred N. Smyser, No. 3, *Judgment reversed.*

NOTE. — *Indianapolis, Bloomington, and Western Railway Company* v. *Rhode Island Locomotive Works*, error to the Circuit Court of the United States for the Southern District of Illinois, was argued by the counsel who appeared in the preceding case. For the reasons there given, the judgment was reversed.

KIBBE v. DITTO ET AL.

The act of the general assembly of Illinois, entitled "An Act to protect married women in their separate property," approved Feb. 21, 1861, repeals, by implication, so much of the saving clause of the Statute of Limitations of 1839 as relates to married women.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Submitted on printed arguments by *Mr. W. C. Goudy* for the plaintiff in error, and by *Mr. T. G. Frost* for the defendants in error.

MR. JUSTICE DAVIS delivered the opinion of the court.

The defendants in this action of ejectment, which was commenced March 20, 1872, for a quarter-section of land in Mercer County, Illinois, pleaded not guilty. A verdict and a judgment were rendered in their favor. The plaintiff sued out this writ of error.

William M. O'Hara, the owner in fee of the land, died intestate in the summer of 1821, leaving a widow, who outlived him less than a year, and four children, three of whom died intestate. Helen, their surviving sister, inherited their respective interests. She intermarried, Sept. 23, 1840, with Abram D. Harrel, who died Dec. 16, 1871. Said Abram and Helen, by deed executed May 2, 1868, conveyed the land to the plaintiff, who thus showed a clear *prima facie* right to recover.

By a stipulation of the parties, entered of record in the court below, it is admitted that the land was vacant and unoccupied prior to December, 1857, and that ever since that date the defendants and their grantors have been in the possession of it under color of title, and paid all the taxes, so as to bring them within the limitation of 1839; that said possession has been by actual residence on the land, if title deducible of record is produced to accompany said possession, so as to make the limitation under the act of 1835.

The defendants, to show color of title, put in evidence a deed for the land executed to them June 12, 1857, by Harding and Matthews.

Were Abram D. Harrel living, there can be no question that the facts set forth in the stipulation would be an absolute bar to a recovery. The Supreme Court of Illinois ruled that an estate held by the husband *jure uxoris* was a freehold, subject to the same incidents as that by the curtesy initiate, and governed in the same manner and to the same extent by the Statute of Limitations. *Kibbie* v. *Williams*, 48 Ill. 30. The earlier case of *Shortal* v. *Hinckley et al.*, 31 id. 219, decides that a tenant by the curtesy initiate has a vested legal estate distinct from that of his wife, and that, if his right as such tenant be barred by the Statute of Limitations, ejectment by the grantees of himself and wife could not in his lifetime be maintained. We are informed by the learned counsel for the plaintiff that the court below held that a former suit, brought there for the demanded premises when Mr. Harrel was living, would not lie.

As the wife's right of possession did not accrue until after the determination of the estate of her husband, it was not tolled until the conditions, prescribed as a bar to her recovery, had occurred after his death. Under the statute of 1839, acts of Illinois, 1838–39, 266, a person having such a continuous possession under color of title, as is here admitted, and paying all taxes upon the land, shall be held to be the legal owner of it to the extent and according to the tenor of his paper title; but that provision does not extend to a *feme covert*, if within three years after the termination of her disability she shall commence an action for the recovery of the land. Conceding to

the grantee of husband and wife the same period after the determination of the coverture for bringing suit as was accorded to her, it is evident, in view of these rulings, that the lapse of time would not in this case defeat a recovery.

Such was the acknowledged limitation before the passage of the act of the general assembly of Illinois, entitled, "An Act to protect married women in their separate property." Laws of 1861, 143. It provides "that all property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof, shall, notwithstanding her marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

These provisions were considered in *Emerson* v. *Clayton*, 32 Ill. 493. A married woman, in her own name and without joining her husband, brought replevin for certain chattels which she claimed as her own property. The defendant pleaded in abatement the coverture of the plaintiff at the time of the commencement of the suit. She replied that the chattels sued for were, during the coverture, acquired in good faith from persons other than her husband, with her own money and in her own right, and as such remained her separate property under her sole control, by virtue of the act of Feb. 21, 1861. The judgment below, sustaining a demurrer to the replication, was reversed, with instructions to overrule the demurrer and give the defendant leave to take issue, should he desire to do so. Mr. Justice Breese, in delivering the opinion of the Supreme Court, remarks, that a *feme covert* could not sue alone for her own property, or for the recovery of any of her rights at common law, as it vested her personal estate in her husband, and gave him absolute dominion over it; but that by the act she

must alone sue for an invasion of the rights which it conferred, and must "be considered a *feme sole* in regard to her estate of every sort owned by her before marriage, or which she may acquire during coverture in good faith from any person not her husband, by descent, devise, or otherwise, together with all the rents, issues, increase, and profits thereof." "The right of 'sole control' over the separate property of the wife by her necessarily confers the power to do whatever is necessary to the effectual assertion and maintenance of that right."

That case involved merely the ownership of personal chattels. The act makes no distinction whatever as to the species of property, and it would seem to be a necessary inference, from the reasoning of the learned judge, that a married woman has a complete and absolute right to sue in her own name to recover her lands in the wrongful possession of another.

The decision is silent as to the property acquired prior to 1861 by a woman then married; but in *Rose* v. *Sanderson*, 38 id. 247, and *Cole* v. *Van Riper*, 44 id. 347, the statute was construed as not applying to an estate in the lands of the wife which was vested in the husband at the date of its passage. *Noble* v. *McFarland*, 51 id. 226, recognizes the same doctrine, and affirms that, in regard to such lands, the time within which the wife must commence her action after the removal of her disability does not begin to run until after the death of her husband. The same court held, in *Beach* v. *Miller*, id. 206, that, where land was conveyed to the wife after the passage of the act, the husband's right to the curtesy was contingent, and that she could sue in her own name, when her rights thereto were affected; and in *Morrison et al.* v. *Norman et al.*, 47 id. 477, that the act did not so far remove the disabilities of coverture as to take married women out of the saving clause of the Statute of Limitations.

The effect of that act was recently considered by that court in a case presenting the following facts: Amos Haskins purchased a tract of land, on the twenty-seventh day of October, 1849, of one Hall, for $140, payable as follows: $50 in one year, $50 in two years, and $40 in three years, from the date of the purchase, for which he gave his promissory notes. He received a bond from Hall, covenanting, on the payment of them, to convey the

property, and entered into possession of it. His son obtained $35 or $40 for one month of one Walrod, to whom he, in the name of said Amos, assigned the bond as security. This, with other money, was used to pay the first note, and the interest on the remaining ones. Amos Haskins died in November, 1850. Walrod, not having been paid the amount loaned, presented, as assignee, the bond to Hall, from whom, on the 19th of that month, on making the deferred payments, he received a deed, which he put on record the day of its date, entered upon the land, made improvements, and paid the taxes thereon.

A bill was filed against Walrod by the heirs-at-law of Amos Haskins, on the 20th of January, 1869, to obtain their rights in the premises. The court said that the bar to a recovery of the possession of the land by an action at law was complete twelve years before the commencement of the suit, and that a court of equity, following the analogies of the law, should refuse the relief sought.

At the time Walrod went into possession of the land, three of the complainants were under the disability of coverture, and continued to be so when the bill was filed. It was insisted that, as to them, the statute did not run, and that no laches could be imputed. The court declared, that, by the provisions of the act in question, the wife had the entire and sole control over her real and personal property, and that, should her lands be occupied adversely, she could bring ejectment, — use her own money to pay taxes, and thus prevent an occupant from holding possession and paying taxes, until possession and payment would ripen into a bar to a recovery. "It is true," says the court, "that the act of 1861 does not purport to repeal the saving clause in the Statute of Limitations; but it is manifest that a reasonable construction of the language used, in connection with the scope, purpose, and object of the statute, produces this result." "While the saving clause in the Statute of Limitations is not mentioned in the act of 1861, yet the powers conferred by the latter act so completely annihilate the existence of every reason which led to the passage of the former act, protecting a married woman from the running of the Statute of Limitations, that it would be absurd to hold that the two acts could stand together."

Emerson v. *Clayton* was cited and approved, and any expressions in *Noble* v. *McFarland* and other cases, which conflict with the opinion, were modified by the construction it gave to the act.

It is, therefore, clear that a woman who marries after the passage of the act in question is not within the saving clause of the Statute of Limitations, as against a party in the adverse possession of lands whereof she was seised at the time of her marriage, or which she subsequently acquires in the mode and manner mentioned in the act. As to the lands of which a woman, married at the date of the act, was previously seised, the limitation begins to run against her after the lapse of time barred the husband's right to recover them. The court uses this language: "When, therefore, the life-estate, which the husband had acquired by virtue of the marriage, was terminated by operation of the Statute of Limitations, and the act of 1861 removed the disability of coverture of the complainants, they were then bound to bring their action within seven years, or their right or title would be barred. This the complainants failed to do, but permitted the defendant to remain upon the land undisturbed for more than seven years after the passage of the act of 1861. By non-action on their part they have lost their rights. They are not protected by the saving clause of the statute."

Castner et al. v. *Walrod*, in which these views are announced, was decided by the Supreme Court of Illinois, Jan. 30, 1875. It was, on a petition for rehearing, reaffirmed in an elaborate opinion, filed Jan. 31, 1877.

Applying them to this case, it follows that the life-estate of Abram D. Harrel was, in December, 1864, extinguished by the operation of the statute. His wife's right of entry was then absolutely vested, and, notwithstanding her coverture, was completely barred in 1871. The plaintiff claiming under her is, therefore, not entitled to maintain this suit.

It may be proper to add, that the defendants put in evidence a paper writing, purporting to be a certified copy of a mortgage of the land in controversy by said William O'Hara and his wife, bearing date September, 1820, to John P. Cabanne; and the record of certain proceedings of the Circuit Court of

Pike County, within the then limits of which the land was situate, showing that the mortgagee filed his bill of foreclosure April 23, 1822, the first day of the term, against Susan O'Hara, the widow, and others, children and heirs of William M. O'Hara; an order of publication against defendants as non-residents; a decree of foreclosure; the appointment of a commissioner to make sale of the mortgaged premises; his report; the order confirming his doings in the premises; his acknowledgment of the deed to said John P. Cabanne, the purchaser, dated Feb. 20, 1823; and the approval by the court of said deed. The defendants proved that Cabanne died in 1842, leaving children and grandchildren, a part of whom conveyed by deed, dated April 1, 1861, five undivided sevenths of the demanded premises to one Nettleton, who conveyed by way of quitclaim to the defendants.

Various questions arising upon this evidence, — the jurisdiction of the Pike Circuit Court, the validity of its decree, and the charge of the court below upon these and other matters involved, — have been argued at great length, and with marked ability. We do not consider it necessary to express any opinion upon them. Error in regard to them, if any there be, would be of no avail to the plaintiff. The unreported case we have last cited establishes a rule of property in Illinois, which binds the courts of the United States, and presents an insuperable bar to his recovery. *Judgment affirmed.*

INDEX.

ABANDONMENT. See *Letters-patent*, 14.

ADMIRALTY. See *Practice*, 23.

1. Owners of a ship are not liable, under existing laws, for any loss, damage, or injury by a collision, occasioned without their privity or knowledge, beyond the amount of their interest in such ship and her cargo at the time the collision occurred. *The "Atlas,"* 302.
2. The true measure of compensation to an innocent party, in a case of collision, is damages to the full amount of loss actually suffered by him. *Id.*
3. The shipper or consignee of the cargo of a vessel, being innocent of all wrong, bears no proportion of the loss resulting from a collision. He may pursue his remedy at common law; or in admiralty, by a proceeding *in rem*, or by libel *in personam* against the owner of either or both of the offending vessels. *Id.*
4. A collision between two vessels, which were at fault, resulted in the loss of the cargo of a third vessel which was not at fault. Its owner proceeded *in rem* against one of the offending vessels, — *Held*, that he was entitled to a decree against it for the entire amount of his damages. *Id.*
5. The doctrine announced in *The "Atlas," supra*, p. 302, that where an innocent party suffers damages by a collision resulting from the mutual fault of two vessels, only one of which is libelled, the decree should be against such vessel for the whole amount of the damages, and not for a moiety thereof, reaffirmed, and applied to this case. *The "Juniata,"* 337.
6. The rule requiring a sailing-vessel to keep her course when approaching a steamer in such direction as to involve risk of collision, does not forbid such necessary variations in her course as will enable her to avoid immediate danger arising from natural obstructions to navigation. *The "John L. Hasbrouck,"* 405.
7. Where well-known usage has sanctioned one course for a steamer ascending, and another for a sailing-vessel descending, a river, the vessel, if required by natural obstructions to navigation to change her course, is, after passing them, bound to resume it. Failing to do

ADMIRALTY (*continued*).

so, and continuing her course directly into that which an approaching steamer is properly navigating, she is not entitled to recover for a loss occasioned by a collision, which the steamer endeavored to prevent, by adopting the only means in her power. *Id.*

ADVANCEMENT OF CAUSES. See *Practice*, 1, 30.

AFFREIGHTMENT. See *Contracts*, 1.

AGENT. See *Bills of Exchange and Promissory Notes*, 4; *Common Carriers*, 2–5.

1. The government is not bound by the act or declaration of its agent, unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for it. *Whiteside et al.* v. *United States*, 247.
2. Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity. *Id.*

AMENDMENTS.

Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. *Tilton et al.* v. *Cofield et al.*, 163.

APPEAL. See *Supersedeas*, 1.

APPROPRIATIONS FOR IMPROVEMENT OF HARBORS ON NAVIGABLE RIVERS. See *Commerce*, 5.

ARKANSAS, PRACTICE CODE OF. See *Practice*, 17.

ASSIGNEE IN BANKRUPTCY. See *Contracts*, 5.

1. Under the Bankrupt Act of March 2, 1867 (14 Stat. 517), the assignee might sue in the State courts to recover the assets of the bankrupt, no exclusive jurisdiction having been given to the courts of the United States. *Quære*, Whether such exclusive jurisdiction is given by the Revised Statutes. *Claflin* v. *Houseman, Assignee*, 130.
2. A suit pending against a party at the time he is adjudged a bankrupt, may, after due notice to his assignee, be prosecuted to final judgment against the latter in his representative capacity, where he makes no objection to the jurisdiction and the bankrupt court does not arrest the proceedings. *Norton, Assignee*, v. *Switzer*, 355.
3. Such judgment may be filed with the assignee as an ascertainment of the amount due to the creditor by the bankrupt, and as a basis of dividends, but it is effectual and operative for that purpose *only*. *Id.*

ASSISTANT SPECIAL AGENT OF THE TREASURY. See *Contracts*, 3.

ASSUMPSIT. See *Pleading*, 3.

ATTACHMENT SUITS, POWER TO AMEND IN.

Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. *Tilton et al.* v. *Cofield et al.*, 163.

BAILMENT. See *Mixture of Goods.*

1. Actual delivery by the bailee on the demand of the true owner, who has the right to the immediate possession of the goods bailed, is a sufficient defence of the bailee against the claim of the bailor, and there is no difference in this regard between a common carrier and other bailees. *The "Idaho,"* 575.
2. While a contract of bailment undoubtedly raises a strong presumption that the bailor is entitled to the thing bailed, it is not true that the bailee thereby conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed, — to restore it, *or to account for it.* He does so account for it when he has yielded it to the claim of one who has a right paramount to that of his bailor. *Id.*
3. If there be any estoppel on the part of the bailee, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. *Id.*
4. Nor can it be maintained that a carrier can excuse himself for failure to deliver to the order of the shipper, only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. *Id.*
5. Whether the shipper has obtained, by fraud practised upon the true owner, the possession he gives to the carrier, or whether he mistakenly supposes he has rights to the property, his relation to his bailee remains the same. He cannot confer rights which he does not possess; and, if he cannot withhold the possession from the true owner, one claiming under him cannot. *Id.*
6. While a bailee cannot avail himself of the title of a third person (though that person be the true owner), for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title, he is not answerable if he has delivered the property to its true owner at his demand. *Id.*
7. Without asserting that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, the court holds, that, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and that it will represent the ownership of the goods. Their subsequent removal from the vessel by a person other than the true owner, either with or without the consent of her officers, cannot divest that ownership. *Id.*
8. The taking possession of property by one not its owner, or authorized

BAILMENT (*continued*).
by him, shipping it, obtaining bills of lading from the carriers, indorsing them away, or even selling the property and obtaining a full price for it, can have no effect upon the rights of the owner, even in the case of a *bona fide* purchaser. *Id.*

BANKRUPTCY. *See Assignee in Bankruptcy; Jurisdiction*, 2, 7, 12.

BILL OF EXCEPTIONS. See *Practice*, 31.

BILL OF LADING. See *Bailment*, 7, 8; *Common Carriers*, 1, 5.
The statutes of Louisiana prohibit the issue of bills of lading before the receipt of the goods; but they do not forbid curing an illegal bill by supplying goods, the receipt of which have been previously acknowledged. *The "Idaho,"* 575.

BILL OF REVIEW. See *Practice*, 15.

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *Evidence*, 2; *Protest and Notice.*

1. A *bona fide* holder of negotiable paper, purchased before its maturity upon an unexecuted contract, on which part payment only had been made when he received notice of fraud, and a prohibition to pay, is protected only to the amount paid before the receipt of such notice. *Dresser* v. *Missouri & Iowa Railway Construction Co.*, 92.
2. As the Statute of Limitations was suspended in Louisiana during the war, a note dated Jan. 28, 1859, payable twelve months thereafter, was not prescribed when the plaintiffs, the executors of A., made a legal demand therefor by instituting an action, Jan. 5, 1870. The defendant, by paying the note at that time, could, therefore, have been subrogated to their rights, and could have maintained suit against the maker in their names. *Bird et al., Ex'rs*, v. *Louisiana State Bank*, 97.
3. The holder of a note which is secured by mortgage may proceed at law and in equity at the same time, until he obtains actual satisfaction of the debt. *Ober* v. *Gallagher*, 199.
4. In law, a person with whom a note is deposited for collection is the agent of the holder, and not of the maker. The maker has no interest in it, except to pay the note. Failing to do this, he leaves it to be dealt with as others interested may choose. *Dodge et al.* v. *Freedman's Savings & Trust Co.*, 379.
5. Where a note, deposited in bank for collection by its owner, was paid by a person not a party thereto, with the intention of having it remain as an existing security, and the money so paid was received by the owner of the note, — *Held*, that such person thereby became the purchaser of the note, and its negotiability remains after as before maturity, subject to the equities between the parties. *Id.*
6. The order of the President of the United States of April 29, 1865 (13 Stat. 776), removed, from that date, all restrictions upon commercial

BILLS OF EXCHANGE AND PROMISSORY NOTES (*continued*).
intercourse between Tennessee and New Orleans; and neither the rights nor the duties of the holder of a bill of exchange, drawn at Trenton, Tenn., which matured in New Orleans before June 13, 1865, were dependent upon, or affected by, the President's proclamation of the latter date (id. 763). *Bond et al.* v. *Moore*, 593.

BURDEN OF PROOF. See *Domicile*, 1; *Letters-patent*, 12.
Where the evidence on the part of the plaintiff in an action against a railroad company for injuries received upon its road did not tend to establish contributory negligence on his part, the court charged that the burden of proving it rested on the defendant, and that it must be established by a preponderance of evidence, — *Held*, that the charge was not erroneous. *Indianapolis & St. Louis R. R. Co.* v. *Horst*, 291.

CALIFORNIA.
Grants of land to. See *School Lands*.
Selections of land by. See *Public Lands*, 1–5.

CALLAWAY, COUNTY OF. See *Municipal Bonds*, 3, 4.

CARRIERS OF PASSENGERS. See *Burden of Proof*.
1. In an action against a railroad company for injuries received by a passenger upon its road, it is not error for the court to instruct the jury "that a person taking a cattle-train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes." *Indianapolis & St. Louis R. R. Co.* v. *Horst*, 291.
2. The rule of law, that the standard of duty on the part of a carrier of passengers should be according to the consequences that may ensue from carelessness, applies as well to freight-trains as to passenger-trains. It is founded deep in public policy; and is approved by experience, and sanctioned by the plainest principles of reason and justice. *Id.*

CAVEAT EMPTOR. See *Purchasers at Judicial Sales*, 1–3.

CHAMPAGNE WINES. See *Import Duties*.

COLLISION. See *Admiralty; Practice*, 23.

COMMERCE.
1. The compact between South Carolina and Georgia, made in 1787, by which it was agreed that the boundary between the two States should be the northern branch or stream of the Savannah River, and that the navigation of the river along a specified channel should for ever be equally free to the citizens of both States, and exempt from hinderance, interruption, or molestation, attempted to be enforced by one State on the citizens of the other, has no effect upon the subsequent constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several States. *South Carolina* v. *Georgia et al.*, 4.

COMMERCE (*continued*).

2. Congress has the same power over the Savannah River that it has over the other navigable waters of the United States. *Id.*
3. The right to regulate commerce includes the right to regulate navigation, and hence to regulate and improve navigable rivers and ports on such rivers. *Id.*
4. Congress has power to close one of several channels in a navigable stream, if, in its judgment, the navigation of the river will be thereby improved. It may declare that an actual obstruction is not, in the view of the law, an illegal one. *Id.*
5. An appropriation for the improvement of a harbor on a navigable river, "to be expended under the direction of the Secretary of War," confers upon that officer the discretion to determine the mode of improvement, and authorizes the diversion of the water from one channel into another, if, in his judgment, such is the best mode. By such diversion preference is not given to the ports of one State over those of another. *Quære*, Whether a State suing for the prevention of a nuisance in a navigable river, which is one of its boundaries, must not aver and show that she sustains some special and peculiar injury thereby, such as would enable a private person to maintain a similar action. *Id.*
6. Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the State; and, as thus applied, it constitutes no encroachment upon the commercial power of Congress. *Sherlock et al.* v. *Alling, Administrator*, 99.
7. The action of Congress as to a regulation of commerce, or the liability for its infringement, is exclusive of State authority; but, until some action is taken by Congress, the legislation of a State, not directed against commerce or any of its regulations, but relating generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or inter-State commerce, or persons engaged in such commerce. *Id.*
8. The act of March 30, 1852, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, and for other purposes," does not exempt the owners and master of a steam vessel, and the vessel, from liability for injuries caused by the negligence of its pilot or engineer, but makes them liable for all damages sustained by a passenger or his baggage, from any neglect to comply with the provisions of the law, no matter where the fault may lie; and, in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers. *Id.*

COMMERCE (*continued*).

9. The relation between the owner or master and pilot, as that of master and employé, is not changed by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors. *Id.*
10. Congress, under its constitutional power to regulate commerce with the Indian tribes, may not only prohibit the unlicensed introduction and sale of spirituous liquors in the "Indian country," but extend such prohibition to territory in proximity to that occupied by Indians. *United States* v. *Forty-three Gallons of Whiskey, &c.*, 188.
11. It is competent for the United States, in the exercise of the treaty-making power, to stipulate, in a treaty with an Indian tribe, that, within the territory thereby ceded, the laws of the United States, then or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect, until otherwise directed by Congress or the President of the United States. *Id.*
12. Such a stipulation operates *proprio vigore*, and is binding upon the courts, although the ceded territory is situate within an organized county of a State. *Id.*

COMMERCIAL INTERCOURSE. See *Bills of Exchange and Promissory Notes*, 6.

COMMON CARRIERS. See *Bailment*, 1–8.

1. A party engaged as a common carrier cannot, by declaring or stipulating that he shall not be so considered, divest himself of the liability attached to the fixed legal character of that occupation. *Bank of Kentucky* v. *Adams Express Co.*, 174.
2. A common carrier, who undertakes for himself to perform an entire service, has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ an agency, but it must be subordinate to him, and not to the shipper, who neither employs it, pays it, nor has any right to interfere with it. Its acts become his, because done in his service and by his direction. *Id.*
3. Therefore, where an express company engaged to transport packages, &c., from one point to another, sends its messenger in charge of them on the car set apart for its use by the railroad company employed to perform the service, the latter company becomes the agent of the former. *Id.*
4. An exception in its bill of lading, "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire," does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a

COMMON CARRIERS (*continued*).
railroad company to which the former had confided a part of the duty it had assumed. *Id.*
5. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between him and the performing company. *Id.*

COMPROMISE, OFFERS OF. See *Evidence*, 6.

CONDITION SUBSEQUENT. See *Life Insurance*, 1–3.

CONFIRMATORY STATUTE. See *Land Grants*, 1–3.

CONFISCATION PROCEEDINGS. See *Jurisdiction*, 17.

CONSTITUTIONAL LAW.
1. A provision in the Code of Wisconsin to the effect, that, when the defendant is out of the State, the Statute of Limitations shall not run against the plaintiff, if the latter resides in the State, but shall if he resides out of the State, is not repugnant to the second section of the fourth article of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Chemung Canal Bank* v. *Lowery*, 72.
2. Unless restrained by provisions of its constitution, the legislature of a State possesses the power to direct a restitution to tax-payers of a county, or other municipal corporation, of property exacted from them by taxation, into whatever form the property may be changed, so long as it remains in possession of the municipality. The exercise of this power infringes upon no provision of the Federal Constitution. *Board of Commissioners, &c.* v. *Lucas, Treasurer*, 108.
3. An insurance company conformed to the requirements of the act of the legislature of Georgia, and received from the comptroller-general a certificate authorizing it to transact business in that State for one year from Jan. 1, 1874. That act does not, expressly or by implication, limit or restrain the exercise of the taxing power of the State, or of any municipality. An ordinance of the city council of Augusta, passed Jan. 5, 1874, imposed from that date an annual license tax "on each and every fire, marine, or accidental insurance company located, having an office or doing business within" that city. *Held*, that the ordinance is not in violation of that clause of the Constitution of the United States which declares that "no State shall pass any law impairing the obligations of contracts." *Home Insurance Co.* v. *City Council of Augusta*, 116.

CONTINGENT COMPENSATION.
An agreement to pay a contingent compensation for professional services of a legitimate character, in prosecuting a claim against the

CONTINGENT COMPENSATION (*continued*).
United States pending in one of the executive departments, is not in violation of law or public policy. *Stanton et al.* v. *Embrey, Administrator*, 548.

CONTRACTS. See *Constitutional Law*, 8; *Exemption from Taxation; Life Insurance*, 1–5; *Practice*, 17; *Revival of Contracts; Winona, City of.*

1. Where a steamer, lying at the time at the wharf at St. Louis, was taken into the service of the United States by a quartermaster of the United States, for a trip to different points on the Mississippi River, the compensation for the service required being stated at the time to the captain, and no objection being made to the service or compensation, and the service was rendered, the possession, command, and management of the steamer being retained by its owner, — *Held*, that the United States were charterers of the steamer upon a contract of affreightment, and that they were not liable, under such a contract, to the owner for the value of the steamer, though she was destroyed by fire whilst returning from the trip, without his fault. *Shaw* v. *United States*, 235.
2. The Post-office Department, by public notice, invited proposals for conveying the mails on route No. "43,132, from Portland, Oregon, by Port Townsend (W. T.) and San Juan, to Sitka, Alaska, fourteen hundred miles and back, once a month, in safe and suitable steamboats." The notice, after fixing the time of departure and arrival from the terminal ports, contained the following: "Proposals invited to begin at Port Townsend (W. T.), five hundred miles less. Present pay, $34,800 per annum." *Held*, 1. That, under sect. 243 of the act of June 8, 1872 (17 Stat. 313), this was a sufficient notice that proposals were desired for carrying the mails between Port Townsend and Sitka. 2. That the acceptance by the Post-office Department of the proposal of a bidder to so carry them created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. *Garfielde* v. *United States*, 242.
3. An assistant special agent of the Treasury Department has no authority to bind the United States by contract, to repay the expenses of transporting, repairing, &c., abandoned or captured cotton. *Whiteside et al.* v. *United States*, 247.
4. Where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induces the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods. *Donaldson, Assignee*, v. *Farwell et al.*, 631.
5. The defeasible title of the vendee to the goods so acquired vests in his assignee in bankruptcy, and is subject to be determined by the prompt disaffirmance of the contract by the vendor. *Id.*

CONTRIBUTORY NEGLIGENCE. See *Burden of Proof.*

COURSES AND DISTANCES. See *Deeds, Construction of*, 1, 2.

COURT AND JURY. See *Practice*, 10, 19, 24, 25.

DAMAGES. See *Admiralty.*

DECLARATIONS OF A PARTY WHEN IN POSSESSION OF LAND. See *Evidence*, 3.

DEED.

A deed takes effect only from the time of delivery, and, when deposited as an escrow, nothing passes by it unless the condition is performed. *County of Calhoun et al.* v. *American Emigrant Co.*, 124.

DEEDS, CONSTRUCTION OF.

1. The rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance of real estate, will not be enforced, when the instrument would be thereby defeated, and when the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify the land. *White et al.* v. *Luning*, 514.
2. So far as it relates to the description of the property conveyed, the rule of construction is the same, whether the deed be made by a party in his own right or by an officer of the court. *Id.*

DEMURRER. See *Pleading*, 1, 2, 4; *Practice*, 8.

DISBURSING OFFICERS. See *United States, Right of, to Priority of Payment.*

DISTILLERIES.

1. Where, pursuant to the tenth section of the act of July 20, 1868 (15 Stat. 129), a survey of a distillery and an estimate of its producing capacity is made, and a copy thereof furnished the distiller, such survey and estimate conclusively determine the producing capacity of the distillery, fix the minimum tax due from him, and can only be abrogated by a new survey and estimate, ordered by the Commissioner of Internal Revenue, a copy of which is furnished to the distiller. *United States* v. *Ferrary et al.*, 625.
2. An abortive attempt to make a new estimate to take the place of the former cannot have the effect to annul it. *Id.*

DISTRICT OF COLUMBIA, LIABILITY OF THE TRUSTEES OF CERTAIN CORPORATIONS THEREIN.

The act of Congress (16 Stat. 98), under which certain corporations are organized in the District of Columbia, contains a provision, that, "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually

DISTRICT OF COLUMBIA, LIABILITY OF THE TRUSTEES OF CERTAIN CORPORATIONS THEREIN (*continued*).

liable for such excess to the creditors of the company." *Held*, 1. That an action at law cannot be sustained by one creditor among many for the liability thus created, or for any part of it, but that the remedy is in equity. 2. That this excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of its debts. *Hornor* v. *Henning et al.*, 228.

DOMICILE.

1. A domicile once existing continues until another is acquired; and, where a change thereof is alleged, the burden of proof rests upon the party making the allegation. *Desmare* v. *United States*, 605.
2. A., whose domicile was, and continued during the war to be, at New Orleans, went into or remained within the territory embraced by the rebel lines, engaged actively in the service of the rebel government, and, while so engaged, purchased certain cotton, which, upon the subsequent occupation of that territory by the military forces of the United States, was seized, sold, and the proceeds paid into the treasury. *Held*, that his purchase of the cotton was illegal and void, and gave him no title thereto. *Id.*

DOUBLE INSURANCE. See *Insurance*, 1–4.

EQUITABLE ESTOPPEL.

1. For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. *Brant* v. *Virginia Coal & Iron Co. et al.*, 326.
2. Where the estoppel relates to the title of real property, it is essential to the application of the doctrine, that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel. *Id.*

EQUITABLE VALUE. See *Life Insurance*, 3, 4.

EQUITY. See *District of Columbia, Liability of the Trustees of Certain Corporations therein.*

1. A mistake as to a matter of fact, to warrant relief in equity, must be material; and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied

EQUITY (*continued*).
that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Grymes* v. *Sanders et al.*, 55.

2. Mistake, to be available in equity, must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." *Id.*

3. Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract, as if the mistake or fraud had not occurred. This applies peculiarly to speculative property, which is liable to large and constant fluctuations in value. *Id.*

4. A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. *Id.*

5. A court of equity cannot act as a court of review, and correct errors of a court of law, nor can it, in the absence of fraud, collaterally question the conclusiveness of a judgment at law. *Tilton et al.* v. *Cofield et al.*, 163.

ESCROW. See *Deed; Estoppel.*

ESTOPPEL. See *Bailment*, 3; *Equitable Estoppel*, 1, 2; *Municipal Corporations*, 2, 3.

A county, by its contract for the sale of lands, whereof it was the owner, stipulated that it would not assess taxes against them until after they should be conveyed. The deed was executed, and deposited with the clerk of the board of county supervisors as an escrow, and was not to be delivered until the performance by the grantee of a certain condition. The condition was not performed; and the deed having been surreptitiously placed on record, the county brought suit to set it and the contract aside. The court, on May 20, 1872, by consent, dismissed the bill, and decreed that such dismissal should for ever bar and estop the county from setting up any right or title to the lands in controversy. In July following, the county listed certain of the lands for taxes for the years 1870 and 1871; and was proceeding to enforce collection, when the court below, upon a bill filed for that purpose by the appellee, decreed that the assessment was void, and enjoined all proceedings by the county in the matter. *Held*, that the decree was proper. *County of Calhoun et al.* v. *American Emigrant Co.*, 124.

EVIDENCE. See *Burden of Proof; Legacy*, 2; *Letters-Patent*, 2, 12, 13; *Partnership, Notice of Dissolution of*, 1, 2; *Practice*, 10, 20, 24; *Treasurer's Deed for Lands Sold for Taxes*, 1.

1. Testimony, whether parol or documentary, which shows a want of power in officers who issue a patent, is admissible in an action at law to defeat a title set up under it. In such case, the patent is not merely voidable, but absolutely void; and the party is not obliged to resort to a court of equity to have it so declared. *Sherman* v. *Buick*, 209.
2. Declarations made by the holder of a promissory note or of a chattel, while he held it, are not admissible in evidence in a suit upon or in relation to it by a subsequent owner. *Dodge et al.* v. *Freedman's Savings & Trust Co.*, 379.
3. The declarations of a party when in possession of land are, as against those claiming under him, competent evidence to show the character of his possession, and the title by which he held it, but not to sustain or destroy the record title. *Id.*
4. In a trial for homicide, where the question, whether the prisoner or the deceased commenced the encounter which resulted in death, is in any manner of doubt, it is competent to prove threats of violence against the prisoner made by the deceased, though not brought to the knowledge of the prisoner. *Wiggins* v. *People, &c.*, 465.
5. In a case of contributing policies of insurance, adjustments of loss made by an expert may be submitted to the jury, not as evidence of the facts stated therein, or as obligatory, but for the purpose of assisting the jury in calculating the amount of liability of the insurer upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct. *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 527.
6. No part of a letter written as an offer of compromise is admissible in evidence. *Id.*
7. Where the amount of compensation to be paid for professional services of a legitimate character in prosecuting a claim against the United States pending in one of the executive departments was not fixed by the agreement of the parties, evidence of what is ordinarily charged by attorneys-at-law in cases of the same character is admissible. *Stanton et al.* v. *Embrey, Administrator*, 548.

EXCEPTIONS. See *Practice*, 7, 8, 9, 26, 31.

EXECUTORS, ACTIONS AGAINST. See *Practice*, 6.

EXEMPTION FROM TAXATION.

1. Upon a sale of the property and franchises of a railroad corporation under a decree founded upon a mortgage which in terms covers the franchises, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company provided in the act of incorporation does not accompany the

EXEMPTION FROM TAXATION (*continued*).
property in its transfer to the purchaser. The immunity from taxation in such cases is a personal privilege of the company, and not transferable. *Morgan* v. *Louisiana*, 217.
2. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. Immunity from taxation is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property. *Id.*
3. The doctrine announced in *Tucker* v. *Ferguson*, 22 Wall. 527, — that an act of the legislature of a State, exempting property of a railroad company from taxation, is not, when a mere gratuity on the part of the State, a contract to continue such exemption, but is always subject to modification and repeal in like manner as other legislation, — reaffirmed, and applied to this case. *West Wisconsin Railway Company* v. *Board of Supervisors of Trempealeau County*, 595.

EXPRESS COMPANY. See *Common Carriers*, 2–5.

FINAL JUDGMENT.
If by any direction of a Supreme Court of a State an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject in a proper case to review by this court. *So held*, where, upon appeal from an interlocutory order made by a circuit court of Indiana, granting a temporary injunction, the Supreme Court of the State reversed the order and remanded the cause to the lower court, with directions to dismiss the complaint. *Board of Commissioners, &c.* v. *Lucas, Treasurer*, 108.

FORECLOSURE SALE. See *Purchasers at Judicial Sales*, 1–3.

FORFEITURE. See *Jurisdiction*, 17; *Life Insurance*, 1–5.

FRANCHISES OF RAILROAD CORPORATIONS. See *Exemption from Taxation*, 1, 2.

FRAUD. See *Bailment*, 4, 5; *Bills of Exchange and Promissory Notes*, 1; *Contracts*, 4, 5; *Equitable Estoppel*, 1, 2; *Equity*, 3, 5; *Liens on Personal Property*, 2.

FREIGHT-TRAINS, PASSENGERS ON. See *Carriers of Passengers*, 1, 2.

GARNISHMENT. See *Sureties in an Appeal Bond*, 3.

GEORGIA AND SOUTH CAROLINA, COMPACT OF 1787 BETWEEN. See *Commerce*, 1.

GEORGIA, INSURANCE COMPANIES DOING BUSINESS IN. See *Constitutional Law*, 3.

GRANT. See *Nevada*, 2.

HABEAS CORPUS. See *Jurisdiction*, 11.

1. Where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from this court, it will not on *habeas corpus* review the legality of the proceedings. *Ex parte Parks*, 18.
2. It is only where the proceedings below are entirely void, either for want of jurisdiction or other cause, that such relief will be given. *Id.*
3. *Ex parte Yerger*, 8 Wall. 85, and *Ex parte Lange*, 18 id. 163, referred to and approved. *Id.*

HOMICIDE, TRIAL FOR. See *Evidence*, 4.

HOT SPRINGS.

Where, in a suit between some of the claimants to the hot springs in Arkansas, the Supreme Court of that State by its decree refused aid to any of them against the other, except as to the improvements erected by each respectively on the property, and as to them saved the rights of the United States, this court having decided in *Hot Springs Cases*, 92 U. S. 698, that the United States is the owner of the property, affirms that decree. *Gaines et al.* v. *Hale et al.*, 8.

ILLINOIS.

MARRIED WOMAN'S SEPARATE PROPERTY ACT. See *Liens on Personal Property.*

The act of the general assembly of Illinois, entitled "An Act to protect married women in their separate property," approved Feb. 21, 1861, repeals, by implication, so much of the saving clause of the Statute of Limitations of 1839 as relates to married women. *Kibbe* v. *Ditto et al.*, 674.

TOWN AUDITORS IN.

A supervisor, town-clerk, or justice of the peace, although his resignation is tendered to and accepted by the proper authority, continues in office, and is not relieved from his duties and responsibilities as a member of the board of auditors, under the township organization laws of the State of Illinois, until his successor is appointed, or chosen and qualified. *Badger et al.* v. *United States ex rel. Bolles*, 599.

IMPORT DUTIES.

The act of Congress of July 14, 1870 (16 Stat. 262), imposed on champagne wine a duty of six dollars per dozen bottles (quarts), and three dollars per dozen bottles (pints), and upon each bottle containing it an additional duty of three cents. *De Bary* v. *Arthur, Collector*, 420.

INDIAN TRIBES, COMMERCE WITH. See *Commerce*, 10–12.

INFRINGEMENT OF LETTERS-PATENT, MEASURE OF DAMAGES FOR.

1. In an action at law for the infringement of letters-patent, the rule as to the measure of damages is, that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict not exceeding three times that amount, together with costs. *Birdsall et al.* v. *Coolidge*, 64.
2. Where the unlawful acts consist in making and selling a patented improvement, or in its extensive and protracted use, without palliation or excuse, evidence of an established royalty will, in an action at law, undoubtedly furnish the true measure of damages; but where the use is a limited one, and for a brief period, the arbitrary and unqualified application of that rule is erroneous. *Id.*

INSURANCE. See *Evidence*, 5, 6.

1. A policy of insurance taken out by warehouse-keepers, against loss or damage by fire on "merchandise, their own or held by them in trust, or in which they have an interest or liability, contained in" a designated warehouse, covers the merchandise itself, and not merely the interest or claim of the warehouse-keepers. *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 527.
2. If the merchandise be destroyed by fire, the assured may recover its entire value, not exceeding the sum insured, holding the remainder of the amount recovered, after satisfying their own loss, as trustees for the owners. *Id.*
3. Goods described in a policy as "merchandise held in trust" by warehousemen, are goods intrusted to them for keeping. The phrase, "held in trust," is to be understood in its mercantile sense. *Id.*
4. A policy was taken out by warehousemen on "merchandise" contained in their warehouses, "their own or held by them in trust, or in which they have an interest or liability." Depositors of the merchandise, who received advances thereon from the warehousemen, took out other policies covering the same goods. *Held*, that the several policies constituted double insurance, and that they bear a loss proportionally. *Id.*

INTEREST. See *Jurisdiction*, 8.

INVENTION. See *Letters-Patent.*

IOWA, DEED FOR LANDS SOLD FOR DELINQUENT TAXES IN. See *Treasurer's Deed for Lands Sold for Taxes.*

JUDGMENTS AT LAW. See *Equity*, 5.

JURISDICTION. See *Habeas Corpus*, 1, 3; *New Mexico, Private Land Claims in; Writs of Error*, 3.

I. OF THE SUPREME COURT.

1. Under sect. 692 of the Revised Statutes, an appeal could not be had

JURISDICTION (*continued*).

to this court from the final decree of a circuit court, unless the matter in dispute, exclusive of costs, exceeded the sum or value of $2,000. *Terry* v. *Hatch*, 44.

2. In a suit by its creditors against an insolvent bank, which had made an assignment for their benefit, claims amounting to $440,000, including a decree in favor of A. for $23,297, and judgments in favor of B. for $88,000, were proved and allowed. There was realized under the assignment $30,000, the *pro rata* distribution of which was decreed by the court. A. filed an exception to the allowance of B.'s claim, which was overruled; whereupon he, by leave of the court, took a separate appeal, "without joining any party to the record with him as appellant," or any party as defendant except B. *Held*, that the amount in dispute here is the interest of A. in that portion of the $30,000 payable by the decree to B., which the former would have received had his exception been sustained, and the amount decreed the latter been distributed *pro rata* among all the creditors. As that interest is less than $2,000, this court has no jurisdiction. *Id.*

3. Where a statute of, or authority exercised under, a State is drawn in question, on the ground of its repugnance to the Constitution of the United States, or a right is claimed under that instrument, the decision of a State court in favor of the validity of such statute or authority, or adverse to the right so claimed, can be reviewed here. *Home Insurance Co.* v. *City Council of Augusta*, 116.

4. As the Code of Practice of Louisiana provides that all definitive or final judgments must be signed by the judge rendering them, this court, under sect. 691 of the Revised Statutes, as amended by the act of Feb. 16, 1875 (18 Stat. 316), cannot, where the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs, review the judgment of a circuit court of the United States sitting in that State, signed subsequently to May 1, 1875. *Yznaga Del Valle* v. *Harrison et al.*, 233.

5. The doctrine in *Lee* v. *Watson*, 1 Wall. 337, that, "in an action upon a money-demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion, must be considered in determining whether this court can take jurisdiction," affirmed and applied to the present case. *Schacker* v. *Hartford Fire Ins. Co.*, 241.

6. Where a petition for the removal of a suit filed under the act of March 2, 1867 (14 Stat. 558), was, in accordance with the practice of the State, reserved for the decision of the Supreme Court, and the latter dismissed the petition, and remanded the cause to the inferior court for further proceedings according to law, — *Held*, that this court has no jurisdiction. *Kimball* v. *Evans*, 320.

7. This court has no jurisdiction to review a judgment of the Circuit

JURISDICTION (*continued*).

Court, rendered in a proceeding upon an appeal from an order of the District Court, rejecting the claim of a supposed creditor against the estate of a bankrupt. *Wiswall et el.* v. *Campbell et al., Assignees*, 347.

8. This court has no jurisdiction to review the judgment of a circuit court rendered subsequently to May 1, 1875, unless the matter in dispute exceeds the sum or value of $5,000, exclusive of costs. Interest on the judgment cannot enter into the computation. *Western Union Telegraph Co.* v. *Rogers*, 565.

II. OF THE CIRCUIT COURTS.

9. Under the act of March 2, 1867 (14 Stat. 558), a suit pending in a State court, between a citizen of the State in which the suit was brought and a citizen of another State, could not, on the application of the former, be removed to a circuit court of the United States. *Hurst* v. *Western and Atlantic R. R. Co.*, 71.

10. In a suit brought by a citizen of Louisiana, in the Circuit Court of the United States for the Eastern District of Arkansas, to enforce a lien on lands situate within that district, one of the defendants, a citizen of Tennessee, was served with process in Arkansas. *Held*, that, under the act of Feb. 28, 1839 (5 Stat. 321), such service brought him within the jurisdiction of the court. *Ober* v. *Gallagher*, 199.

III. OF THE DISTRICT COURTS.

11. Whether a matter for which a party is indicted in a district court of the United States is, or is not, a crime against the laws of the United States, is a question within the jurisdiction of that court, which it must decide. Its decision will not be reversed here by *habeas corpus*. *Ex parte Parks*, 18.

IV. OF THE STATE COURTS.

12. Under the Bankrupt Act of March 2, 1867 (14 Stat. 517), the assignee might sue in the State courts to recover the assets of the bankrupt, no exclusive jurisdiction having been given to the courts of the United States. *Quære*, whether such exclusive jurisdiction is given by the Revised Statutes. *Claflin* v. *Houseman, Assignee*, 130.

13. Exclusive jurisdiction for the enforcement of the statutes of the United States may be given to the Federal courts, yet where it is not given, either expressly or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to. *Id.*

14. In such cases, the State courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction, derived from their constitution under the State law. *Id.*

JURISDICTION (*continued*).

V. In General.

15. A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced. *Ober* v. *Gallagher*, 199.
16. A sentence of a court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. *Windsor* v. *McVeigh*, 274.
17. The jurisdiction acquired by the seizure of property, in a proceeding *in rem* for its condemnation for alleged forfeiture, is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end, some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. *Id.*
18. In confiscation proceedings a monition and a notice were issued and published; but the appearance of the owner, for which they called, when made, was stricken out, his right to appear being denied by the court. *Held*, that the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. *Id.*
19. The doctrine, that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. *Id.*

LAND GRANTS.

1. The first section of the act of June 13, 1812 (2 Stat. 748), making further provision for settling the claims to land in the Territory of Missouri, confirms, *proprio vigore*, the rights, titles, and claims to the lands embraced by it, and, to all intents and purposes, operates as a grant. *Ryan et al.* v. *Carter et al.*, 78.
2. The court adheres to the doctrine, announced in its previous decisions, that a confirmatory statute passes a title as effectually as if it in terms contained a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to law. *Id.*
3. Said first section is not, by the proviso thereto annexed, excluded from operating on the right and claim of an inhabitant of a village which is therein named to an out-lot whose title thereto had, on his peti-

LAND GRANTS (*continued*).
tion, been recognized and confirmed by the board of commissioners for adjusting and settling claims to land in said Territory. *Id.*

LAND-GRANT RAILROADS.
1. A provision in an act of Congress, granting lands to aid in the construction of a railroad, that "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States," secures to the government the free use of the road, but does not entitle the government to have troops or property transported over the road by the railroad company free of charge for transporting the same. *Lake Superior & Mississippi R. R. Co.* v. *United States*, 442.
2. Where, throughout an act of Congress, a railroad is referred to, in its character as a road, as a permanent structure, and designated, and required to be, a public highway, the term "railroad" cannot, without doing violence to language, and disregarding the long-established usage of legislative expression, be extended to embrace the rolling-stock or other personal property of the company. *Id.*

LEGACY.
1. In Louisiana, a legacy to two persons, "to be divided equally between them," is a conjoint one. If but one of them survives the testator, he is entitled, by accretion, to the whole of the thing bequeathed. *Mackie et al.* v. *Story*, 589.
2. Parol evidence, to show the intention of the testator, is not admissible. *Id.*

LETTERS-PATENT. See *Infringement of Letters-Patent, Measure of Damages for*, 1, 2.
1. Letters-patent No. 124,340, issued to John Dalton, March 5, 1872, for "an alleged new and useful improvement in ladies' hair-nets," are void, because his specification and claim precisely and accurately describe various fabrics which had been made and were in public use for a long time previous to his application. *Dalton* v. *Jennings*, 271.
2. To defeat a party suing for an infringement of letters-patent, it is sufficient to plead and prove that prior to his supposed invention or discovery the thing patented to him had been patented, or adequately described in some printed publication. A sufficiently certain and clear description of the thing patented is required, not of the steps necessarily antecedent to its production. *Cohn* v. *United States Corset Co.*, 366.
3. Letters-patent No. 137,893, issued April 15, 1873, to Moritz Cohn, for an improvement in corsets, are invalid, the invention claimed by him having been clearly anticipated and described in the English provisional specification of John Henry Johnson, deposited in the Patent

LETTERS-PATENT (*continued*).

Office Jan. 20, 1854, and officially published in England in that year. *Id.*

4. Where a reissued patent is granted upon a surrender of the original, for its alleged defective or insufficient specification, such specification cannot be substantially changed in the reissued patent, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention, as originally claimed. A defective specification can be rendered more definite and certain, so as to embrace the claim made, or the claim can be so modified as to correspond with the specification; but, except under special circumstances, this is the extent to which the operation of the original patent can be changed by the reissue. *Russell* v. *Dodge*, 460.
5. Where the patent was for a process of treating bark-tanned lamb or sheep skin by means of a compound, in which heated fat liquor was an essential ingredient, and a change was made in the original specification, by eliminating the necessity of using the fat liquor in a heated condition, and making, in the new specification, its use in that condition a mere matter of convenience, and by inserting an independent claim for the use of fat liquor in the treatment of leather generally, the character and scope of the invention, as originally claimed, were held to be so enlarged as to constitute a different invention. *Id.*
6. The action of the Commissioner of Patents, in granting a reissue within the limits of his authority, is not open to collateral impeachment; but, his authority being limited to a reissue for the same invention, the two patents may be compared to determine the identity of the invention. If the reissued patent, when thus compared, appears on its face to be for a different invention, it is void, the commissioner having exceeded his authority in issuing it. *Id.*
7. *Klein* v. *Russell*, 19 Wall. 433, stated and qualified. *Id.*
8. Where the claim for a patent for an invention, which consists of a product or a manufacture made in a defined manner, refers in terms to the antecedent description in the specification of the process by which the product is obtained, such process is thereby made as much a part of the invention as are the materials of which the product is composed. *Smith* v. *Goodyear Dental Vulcanite Co. et al.*, 486.
9. Whether the single fact that a device has gone into general use, and displaced other devices previously employed for analogous uses, establishes, in all cases, that the later device involves a patentable invention, it may always be considered as an element in the case, and, when the other facts leave the question in doubt, it is sufficient to turn the scale. *Id.*
10. *Hotchkiss* v. *Greenwood*, 11 How. 248, decides that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of the product. It does not decide that the use of one material in lieu of another in the forma-

LETTERS-PATENT (*continued.*)
tion of a manufacture can, in no case, amount to invention, or be the subject of a patent. *Id.*
11. In the present case the result of the use, in the manner described in the specification, of hard rubber in lieu of the materials previously used for a plate for holding artificial teeth, or such teeth and gums, is a superior product, having capabilities and performing functions which differ from any thing preceding it, and which cannot be ascribed to mere mechanical skill, but are to be justly regarded as the results of inventive effort, as making the manufacture of which they are attributes a novel thing in kind, and, consequently, patentable as such. *Id.*
12. A patent is *prima facie* evidence that the patentee was the first inventor, and casts upon him who denies it the burden of sustaining his denial by proof. *Id.*
13. The presumption arising from the decision of the Commissioner of Patents, granting the reissue of letters-patent, that they are for the same invention which was described in the specification of the original patent, can only be overcome by clearly showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter. *Id.*
14. Upon consideration of the history of this invention, the court holds: 1. That there was no abandonment by the patentee of his original application. 2. That the application upon which the patent was finally allowed was a mere continuation of the original, and not a new and independent one. 3. That the invention was never abandoned to the public. 4. That reissued letters-patent No. 1904, dated March 21, 1865, for an alleged "improvement in artificial gums and palates," are valid. *Id.*

LIEN FOR TAXES.
A lien for taxes does not stand upon the footing of an ordinary incumbrance; and, unless otherwise directed by statute, is not displaced by a sale of the property under a pre-existing judgment or decree. *Osterberg* v. *Union Trust Co.*, 424.

LIENS ON PERSONAL PROPERTY.
1. The owner of personal property, who vests another, to whom it is delivered, with an interest therein, must, if desirous of preserving a lien on it in Illinois, comply with the requirements of the chattel-mortgage act of that State. *Hervey et al.* v. *Rhode Island Locomotive Works*, 664.
2. Where personal property has been sold and delivered, secret liens, which treat the vendor as its owner until payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the vendee holding the possession. *Id.*

LIENS ON PERSONAL PROPERTY (*continued*).

3. Nor is the transaction changed by the agreement assuming the form of a lease. The courts look to the purpose of the parties; and, if that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the vendee who is in possession of it. *Id.*

LIFE-ESTATE. See *Will.*

LIFE INSURANCE.

1. A policy of life insurance which stipulates for the payment of an annual premium by the assured, with a condition to be void on non-payment, is not an insurance from year to year, like a common fire policy; but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making, by its non-performance, the policy void. *New York Life Ins. Co.* v. *Statham et al.*, 24.
2. The time of payment in such a policy is material, and of the essence of the contract; and a failure to pay involves an absolute forfeiture, which cannot be relieved against in equity. *Id.*
3. If a failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insist on the condition; but in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid. *Id.*
4. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or a suit in equity. *Id.*
5. The average rate of mortality is the fundamental basis of life assurance, and as this is subverted by giving to the assured the option to revive their policies or not, after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company. *Id.*
6. In an action upon a policy of life insurance, which provided that it should be null and void if the insured died by suicide, "sane or insane," the company pleaded that he "died from the effects of a pistol-wound inflicted upon his person by his own hand, and that he intended, by inflicting such wound, to destroy his own life." *Held*, that a replication setting up that, "at the time when he inflicted said wound, he was of unsound mind, and wholly unconscious of his act," is bad. *Bigelow* v. *Berkshire Life Ins. Co.*, 284.

LIMITATIONS, STATUTE OF.

Louisiana. See *Bills of Exchange and Promissory Notes*, 2.

Wisconsin. See *Constitutional Law*, 1.

LOUISIANA, BILLS OF LADING UNDER THE LAWS OF. See *Bills of Lading.*

LOUISIANA, LEGACIES UNDER THE LAWS OF. See *Legacy*, 1.

LIABILITY OF SURETIES IN AN APPEAL BOND UNDER THE LAWS OF. See *Sureties in Appeal Bond*, 1–3.

PRACTICE CODE OF. See *Jurisdiction*, 8.

STATUTE OF LIMITATIONS OF. See *Bills of Exchange and Promissory Notes*, 2.

MANDAMUS. See *Public Corporations*, 3, 4.

MARINE TORTS. See *Commerce*, 6–9.

MERCHANDISE HELD IN TRUST. See *Insurance*, 1–4.

MEXICAN OR SPANISH GRANTS. See *New Mexico*, *Private Land Claims in*; *Public Lands*, 1–5.

MINERAL LANDS. See *Nevada*, 4.

MISTAKE AS TO MATTERS OF FACT. See *Equity*, 1–4.

MISSOURI, SUBSCRIPTIONS TO STOCKS OF CORPORATIONS IN. See *Municipal Bonds*, 2, 3, 4.

The powers of a railroad company, in Missouri, in existence prior to the adoption of the constitutional provision of 1865, prohibiting subscriptions to the stock of any corporation by counties, cities, or towns, unless two-thirds of the qualified electors thereof shall assent, are not affected by such provision, but remain the same as if it had never been adopted. *County of Callaway* v. *Foster*, 567.

MISSOURI, TERRITORY OF, CLAIMS TO LAND IN. See *Land Grants*, 1–3.

MIXTURE OF GOODS.

If the owner of goods wilfully and wrongfully mixes them with those of another of a different quality and value, so as to render them undistinguishable, he will not be entitled to any part of the intermixture. *The "Idaho,"* 575.

MONUMENTS. See *Deeds*, *Construction of*, 1, 2.

MORTGAGE. See *Purchasers at Judicial Sales*, 1–3.

MUNICIPAL BONDS. See *Municipal Corporations*; *Railroad Company*.

1. The bonds issued by the county court of Randolph County, Ill., bearing date Jan. 1, 1872, and reciting that they are issued in payment of a subscription of $100,000 to the capital stock of the Chester and Tamaroa Coal and Railway Company, in pursuance of an election held by the legal voters of said county, on the sixth day of June, 1870, and by virtue of the provisions of an act of the general assembly of the State of Illinois, entitled "An Act supplemental to an act to provide for a general system of railroad corporations," are, with the coupons thereto attached, valid, and binding upon the county. *County of Randolph* v. *Post*, 502.

MUNICIPAL BONDS (*continued*).

2. The power conferred by the statute of Missouri of March 10, 1859, upon a county in which may be any part of the route of the Louisiana and Missouri River Railroad Company, to subscribe to the capital stock of that company without submitting the question of such subscription to the vote of the people, was not taken away by the amendatory act of March 24, 1868. *County of Callaway* v. *Foster*, 567.
3. Every reasonable construction of the language of the act of March 10, 1859, embraces the county of Callaway, and the road has been actually located through it. *Id.*
4. The subscription to the stock of the railroad company, having been actually made by that county, under the authority of a legislative act, in January, 1868, was legal, and the circumstance that the bonds were issued at a later date does not impair their validity. *Id.*
5. The acts of March 8, 1867, c. 93, of March 3, 1869, c. 166, and of Feb. 17, 1871, of Wisconsin, under which certain bonds were issued to the Green Bay and Lake Pepin Railroad Company, were not repealed, either directly or by implication, by the acts of the legislature of that State of March 8, 1870, c. 210, and of March 11, 1872, c. 34. *Board of Supervisors of Wood County* v. *Lackawana Iron and Coal Co.*, 619.

MUNICIPAL CORPORATIONS.

1. A change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, embracing substantially the same corporators and the same territory, will not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities, although different powers are possessed under the amended or new charter, and different officers administer its affairs. *Broughton* v. *Pensacola*, 266.
2. It would be an unreasonable restriction of the rights and powers of a municipal corporation to hold that it cannot waive conditions found to be injurious to its interests, or, like other parties to a contract, estop itself. *County of Randolph* v. *Post*, 502.
3. A county in Illinois, a subscriber to the stock of a railway company, agreed to extend the time for completing the road from that originally fixed to a particular date. Before that date, the county, by its proper officers, declared the road completed to its satisfaction, delivered its bonds, and received the stock of the company in return therefor. *Held*, that its action constitutes a waiver and an estoppel which prevent it from raising the objection that the contract was not performed in time. *Id.*

NAVIGATION. See *Admiralty; Commerce*, 3–5.

NEVADA.

1. At the time of the passage of the Nevada Enabling Act, approved March 21, 1864 (13 Stat. 30), sections 16 and 36 in the several townships had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public domain within the limits of Nevada. *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 634.
2. The words of present grant in the seventh section of that act are restrained by words of qualification which were intended to protect the proposed new State against loss that might happen through the subsequent action of Congress in selling or disposing of the public domain. If by such sale or disposal the whole or any part of the sixteenth or thirty-sixth section in any township was lost to the State, she was to be compensated by other lands equivalent thereto, in legal subdivisions of not less than one-quarter section each. *Id.*
3. A qualified person whose settlement on mineral lands which embrace a part of either of said sections was prior to the survey of them by the United States, who, on complying with all the requirements of the act of Congress approved July 26, 1866 (14 Stat. 251), received a patent for such lands from the United States, has a better title thereto than has the holder of an older patent therefor from the State. *Id.*
4. The legislative act of Nevada of Feb. 13, 1867, recognized the validity of the claim of the United States to the mineral lands within that State. *Id.*

NEW MEXICO, PRIVATE LAND CLAIMS IN.

The action of Congress confirming a private land claim in New Mexico, as recommended for confirmation by the surveyor-general of that Territory, is not subject to judicial review. *Tameling* v. *United States Freehold and Emigration Co.*, 644.

NEW TRIALS, MOTIONS FOR. See *Practice*, 22.

NUNC PRO TUNC ORDERS. See *Supersedeas*, 2; *Practice*, 31.

OWNERS AND MASTERS OF STEAM VESSELS. See *Commerce*, 8, 9.

PARTIES. See *Practice*, 4, 5.

Where a trustee is invested with such powers and subjected to such obligations that his beneficiaries are bound by what is done against him or by him, they are not necessary parties to a suit against him by a stranger to defeat the trust in whole or in part. In such case, he is in court on their behalf; and they, though not parties, are concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party. *Kerrison, Assignee*, v. *Stewart et al.*, 156.

PARTNERSHIP, NOTICE OF DISSOLUTION OF.

1. A., having had no previous dealings with a firm, but having heard of its existence, and who composed it, sold goods to one of the partners, and received in payment therefor a draft by him drawn upon the firm, and accepted in its name. At the time of the transaction the firm was, in fact, dissolved; but A. had no notice thereof. *Held*, that, in order to protect a retired partner against such acceptance of the draft at the suit of A., evidence, tending to show a public and notorious disavowal of the continuance of the partnership, is admissible. *Lovejoy* v. *Spofford et al.*, 430.
2. It is not an absolute, inflexible rule, that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard, — as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership, — are proper to be considered on the question of notice. *Id.*

PATENTS FOR LANDS. See *Evidence*, 1.

1. The act of Sept. 28, 1850 (9 Stat. 519), granting swamp-lands, makes it the duty of the Secretary of the Interior to identify them, make lists thereof, and cause patents to be issued therefor. *Held*, that a patent so issued cannot be impeached in an action at law, by showing that the land which it conveys was not in fact swamp and overflowed land. *French* v. *Fyan et al.*, 169.
2. *Railroad Company* v. *Smith*, 9 Wall. 95, examined, and held not to conflict with this principle. *Id.*

PENDENCY OF PRIOR SUITS.

The pendency of a prior suit in a State court is not a bar to a suit in a circuit court of the United States, or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action. *Stanton et al.* v. *Embrey, Administrator*, 548.

PENITENTIARY. See *United States Convicts*, 1–4.

PILOTS OF STEAM VESSELS. See *Commerce*, 8, 9.

PLEADING. See *Letters-Patent*, 2; *Life Insurance*, 6; *Practice*, 20.

1. The English rule, that the Statute of Limitations cannot be set up by demurrer in actions at law, does not prevail in the courts of the United States sitting in Wisconsin. *Chemung Canal Bank* v. *Lowery*, 72.
2. The distinction between actions at law and suits in equity has been abolished by the code of that State; and the objection that suit was not brought within the time limited therefor, if the lapse of time appears in the complaint without any statement to rebut its effect, may be made by way of demurrer, if the point is thereby specially

PLEADING (*continued*).
taken. If the plaintiff relies on a subsequent promise, or on a payment to revive the cause of action, he must set it up in his original complaint, or ask leave to amend. *Id.*
3. It is now the prevailing rule in this country, that a party may maintain assumpsit on a promise not under seal made to another for his benefit. *Hendrick* v. *Lindsay et al.*, 143.
4. Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer. *Stanton et al.* v. *Embrey, Administrator*, 548.

PLEDGEE.
Where the pledgee parts with the pledge to a *bona fide* purchaser without notice of any right or claim of the pledgor, the latter cannot recover against such purchaser without first tendering him the amount due on the pledge. *Talty* v. *Freedman's Savings and Trust Co.*, 321.

PRACTICE. See *Attachment Suits, Power to Amend in; Final Judgment; Pleading*, 1, 2, 3; *Usury*, 1.
1. The court will not, in preference to cases pending between private parties, set down for argument a case in which the execution of the revenue laws of a State has been enjoined, unless it sufficiently appears that the operations of the government of the State will be embarrassed by delay. *Hoge et al.* v. *Richmond, &c. R. R. Co.*, 1.
2. An order striking out an answer, as it ends the cause, leaves the action undefended, and confers a right to immediate judgment, is subject to review in the appellate court. *Fuller et al.* v. *Claflin et al.*, 14.
3. The court below having, on demurrer, held an answer to be sufficient, directed it to be made more specific and certain. The party thereupon filed an answer, which, although in substantial compliance with the order, was stricken out, and judgment rendered in favor of the plaintiff for the amount of the claim sued on. *Held*, that the action of the court in striking out the answer and proceeding to judgment was erroneous. *Id.*
4. Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he cannot ask its reversal here on any matter which will injuriously affect their interests. *Terry* v. *Abraham et al.*, 38.
5. When an appellant seeks to reverse a decree because too large an allowance was made to the appellees out of a fund in which he and they were both interested, he will not be permitted to do so when he has received allowances of the same kind, and has otherwise waived his right to make the specific objection which he raises for the first time here. *Id.*
6. In an action against an executor upon a contract of his testator, where a *devastavit* is not alleged and proved, a judgment *de bonis propriis* is erroneous. *Smith, Executor*, v. *Chapman, Executor*, 41.

PRACTICE (*continued*).

7. If one of a series of propositions presented to a court as one request for a charge to the jury is unsound, an exception to a refusal to charge the entire series cannot be maintained. *Beaver* v. *Taylor et al.*, 46.
8. An exception to the entire charge of the court, or, in gross, to a series of propositions therein contained, cannot be sustained, if any portion thus excepted to is sound. *Id.*
9. An exception to such portions of a charge as are variant from the requests made by a party not pointing out the variances, cannot be sustained. *Id.*
10. In the absence of any evidence whatever to contradict or vary the case made by the plaintiff, it is not error for the court, when the legal effect of the plaintiff's evidence warrants a verdict for him, to so charge the jury. *Hendrick* v. *Lindsay et al.*, 143.
11. A decree in chancery will be reversed if rendered against a woman who is shown by the bill to be both a minor and *feme covert*, where no appearance by or for her has been entered, and no guardian *ad litem* appointed. *O'Hara et al.* v. *MacConnell et al., Assignees*, 150.
12. It is error to render a final decree for want of appearance at the first term after service of subpœna (Equity Rules, 18, 19), unless another rule-day has intervened. *Id.*
13. Where the object is to divest a *feme covert* or minor of an interest in real estate, the title of which is in a trustee for her use, the trust being an active one, it is error to decree against her without making the trustee a party to the suit. *Id.*
14. The making of the conveyance, as ordered by the decree, does not deprive the defendant of the right of appeal. *Id.*
15. Neither a subsequent petition in the nature of a bill of review, nor any thing set up in the answer to such petition on which no action was had by the court, can prevent a party from appealing from the original decree. *Id.*
16. Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. *Tilton et al.* v. *Cofield et al.*, 163.
17. Under the Code of Practice of Arkansas, in force when this judgment was rendered, and therefore furnishing a rule of practice for the courts of the United States in that State, an action on a contract, upon which two or more persons were jointly bound, might be brought against all or any of them; and, although they were all summoned, judgment might be rendered against any of them severally, where the plaintiff would have been entitled to a judgment against such defendants if the action had been against them alone. *Sawin, Administrator*, v. *Kenny*, 289.
18. When instructions are asked in the aggregate, and there is any thing exceptionable in either of them, the court may properly reject the whole. *Indianapolis & St. Louis R. R. Co.* v. *Horst*, 291.

PRACTICE (*continued*).

19. It is the settled law in this court, that, if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to give further instructions. *Id.*
20. A plaintiff is bound to state his case, but not the evidence by which he intends to prove it. *Id.*
21. The construction given in *Nudd et al.* v. *Burrows, Assignee*, 91 U. S. 426, to the act of June 1, 1872 (17 Stat. 197), reaffirmed. *Id.*
22. A motion for a new trial is not a mere matter of proceeding or practice in the district and circuit courts. It is, therefore, not within the act of June 1, 1872, and cannot be affected by any State law upon the subject. *Id.*
23. This court will not, in a case of collision, reverse the concurrent decrees of the courts below, upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower courts have committed an error, and that a wrong has been done to the appellant. *The "Juniata,"* 337.
24. The court is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts in issue. *Mutual Life Ins. Co.* v. *Snyder*, 893.
25. The court below properly refused to give an instruction declaring that a fact was established by unimpeached and uncontradicted testimony, when the record discloses that the testimony touching such asserted fact was conflicting. *Id.*
26. This court can only review so much of the instructions of the court below as was made the subject of an exception. *Id.*
27. The omission of the judge to instruct the jury on a particular aspect of the case, however material, cannot be assigned for error, unless his attention was called to it with a request to instruct upon it. *Id.*
28. A motion to set aside a decree, made by persons not parties to the suit, but who are permitted to intervene only for the purpose of an appeal from the decree as originally rendered, will not operate to suspend such decree. *Sage et al.* v. *Central R. R. Co. of Iowa et al.*, 412.
29. Their separate appeal having been properly allowed and perfected, the case is here to the extent necessary for the protection of their interests. *Id.*
30. A cause, involving private interests only, will not be advanced for a hearing in preference to other suits on the docket. *Id.*
31. When the record shows that an exception was taken and reserved at the trial, it is not necessary that the bill of exceptions be drawn out in form, and signed or sealed by the judge, before the jury retires; but it may be so signed or sealed at a later period; and, when filed *nunc pro tunc*, brings the case within the settled practice of courts of error. *Stanton et al.* v. *Embrey, Administrator*, 548.

PRE-EMPTION. See *Nevada*, 3; *School Lands*.

PRESUMPTION. See *Letters-Patent*, 13.

"PROFITS USED IN CONSTRUCTION," MEANING OF THE EXPRESSION.

The expression "profits used in construction" (within the meaning of the one hundred and twenty-second section of the Internal Revenue Act of June 30, 1864, 13 Stat. 284) does not embrace earnings expended in repairs for keeping the property up to its normal condition, but has reference to new constructions adding to the permanent value of the capital; and when these are made to take the place of prior structures, it includes only the increased value of the new over the old, when in good repair. *Grant, Collector*, v. *Hartford & N. H. R. R. Co.*, 225.

PROPOSALS FOR CARRYING THE MAILS. See *Contracts*, 2.

PROTEST AND NOTICE.

A promissory note, bearing date Jan. 28, 1859, payable twelve months thereafter at the Citizens' Bank, New Orleans, and indorsed by A., the payee, and B., the then owner thereof, who resided in Missouri, was, before maturity, placed in the branch of the Louisiana State Bank at Baton Rouge, whose cashier indorsed and forwarded it to the mother bank at New Orleans for collection. It was duly protested for non-payment by the notary of the mother bank, who mailed notices of protest for the indorsers to the cashier of the branch bank. A., upon whom reliance was principally placed, died, and his executors were qualified before the maturity of the note; but neither they nor B. was served by the branch bank with notice of protest. *Held*, that the bank was liable for any loss thereby sustained by the holder of the note. *Bird et al., Executors*, v. *Louisiana State Bank*, 96.

PUBLIC CORPORATIONS.

1. A public corporation, charged with specific duties, such as building and repairing levees within a certain district, being superseded in its functions by a law dividing the district, and creating a new corporation for one portion, and placing the other under charge of the local authorities, ceases to exist except so far as its existence is expressly continued for special objects, such as settling up its indebtedness, and the like. *Barkley* v. *Levee Commissioners et al.*, 258.
2. If, with such limited existence, no provision is made for the continuance or new election of the officers of such corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be *de facto* extinct. *Id.*
3. In such case, if there be a judgment against the corporation, *mandamus* will not lie to enforce the assessment of taxes for its payment, there being no officers to whom the writ can be directed. *Id.*
4. The court cannot, by *mandamus*, compel the new corporations to perform the duties of the extinct corporation in the levy of taxes for

PUBLIC CORPORATIONS (*continued*).
the payment of its debts, especially where their territorial jurisdiction is not the same, and the law has not authorized them to make such levy. *Id.*
5. Nor can the court order the marshal to levy taxes in such a case; nor in any case, except where a specific law authorizes such a proceeding. *Id.*
6. Under these circumstances, the judgment creditor is, in fact, without remedy, and can only apply to the legislature for relief. *Id.*

PUBLIC LANDS.
1. The act of Congress of July 23, 1866 (14 Stat. 218), confirming selections theretofore made by California of any portion of the public domain, divided them into two classes; namely, one in which they had been made from land surveyed by the United States before the passage of the act, and the other in which the selected lands had not been so surveyed. *Huff* v. *Doyle et al.*, 558.
2. Where the surveys had been made before the passage of the act, it was, by the second section thereof, the duty of the State authorities to notify the local land officer of such selection, where they had not already done so. Such notice was regarded as the date of such selection. *Id.*
3. Where the surveys had not yet been made, the State, under the third section, had the right to treat her selection made before the passage of the act as a pre-emption claim; and the holder of her title was allowed the same time to prove his claim under the act, after the surveys were filed in the local land-office, as was allowed to pre-emptors under existing laws. *Id.*
4. By a fair construction of these provisions, and others of this statute, and of the act of March 3, 1853 (10 Stat. 244), the exception in the first section confirming these selections, of lands "held or claimed under a valid Mexican or Spanish grant," must be determined as of the date when the claimant, under a State selection, undertakes to prove up his claim after the surveys have been made and filed, and within the time allowed thereafter to pre-emptors. *Id.*
5. If at that date the land selected by the State was excluded from such a grant, either by judicial decision or by a survey made by the United States, the claimant may have his claim confirmed. *Id.*

PUBLIC POLICY. See *Common Carriers*, 5; *Contingent Compensation.*

PURCHASERS AT JUDICIAL SALES. See *Lien for Taxes.*
1. As the rule of *caveat emptor* applies to a purchasar at a judicial sale, under a decree foreclosing a mortgage, he cannot retain from his bid a sum sufficient to pay a part of the taxes on the property which were a subsisting lien at the date of the decree of foreclosure. *Osterberg* v. *Union Trust Co.*, 424.
2. Where such a purchaser, having failed to punctually comply with the

PURCHASERS AT JUDICIAL SALES (*continued*).
terms of sale, is granted an extension of time by the court, the property in the mean time to remain in the possession of a receiver, he is not entitled to any of the earnings of the property while it so remains in the possession of the latter, nor is he in a position to question the orders of the court as to their application. *Id.*

3. Before the commencement of a suit to foreclose a mortgage, some of the lands covered by it had been transferred to a trustee, by way of indemnity against a bond upon which he was surety for the mortgagor, and sold by the trustee, with the consent of the mortgagee. The proceeds thereof were subsequently paid over to the receiver appointed in the foreclosure suit. The decree did not order the sale of the lands from which such proceeds arose, nor did the master attempt to sell them. *Held*, that the purchaser at the foreclosure sale acquired no right to such proceeds. *Id.*

PURCHASERS PENDENTE LITE.
A purchaser of property *pendente lite* is as conclusively bound by the results of the litigation as if he had from the outset been a party thereto. *Tilton et al.* v. *Cofield et al.*, 163.

RAILROAD COMPANY.
A company is none the less a railroad company, within the meaning of the act of the general assembly of the State of Illinois, approved Nov. 6, 1849, authorizing counties to subscribe to the capital stock of railroad companies, because its charter vests it with power to carry on, in addition to the business of such a company, that of a coal, or a mining, or a furnace, or a manufacturing company. *County of Randolph* v. *Post*, 502.

"RAILROAD," CONSTRUCTION OF THE TERM. See *Land-Grant Railroads*, 2.

REBELLION, THE. See *Bills of Exchange and Promissory Notes*, 6; *Domicile*, 1, 2.

RECEIVERS. See *Purchasers at Judicial Sales*, 2, 3.

1. A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge. *Cowdrey et al.* v. *Galveston, Houston, & Henderson R. R. Co. et al.*, 352.

2. The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation, and with damages done to property during his management. *Id.*

RECEIVERS (*continued*).

3. Where an attorney and counsellor-at-law, employed by trustees of certain mortgaged property to foreclose the mortgages, upon a stipulated retaining fee, entered upon such retainer, commenced the suit, prosecuted it until prevented by the outbreak of the civil war, and, after the termination of the war, offered to go on with the suit; but, in the mean time, the trustees having died, a new suit was commenced and prosecuted, without his assistance, by the bondholders (for whose security the mortgages were executed), to foreclose the same mortgages, in which suit a receiver was appointed, — *Held*, that his claim for his fee was chargeable against the funds obtained by the receiver from the mortgaged property. *Id.*

REISSUED PATENTS. See *Letters-Patent*, 4–7, 13, 14.

REMOVAL OF CAUSES.

Under the act of March 2, 1867 (14 Stat. 558), a suit pending in a State court, between a citizen of the State in which the suit was brought and a citizen of another State, could not, on the application of the former, be removed to a circuit court of the United States. *Hurst* v. *Western & Atlantic R. R. Co.*, 71.

REQUESTS FOR INSTRUCTIONS. See *Practice*, 7–9, 18, 19, 27.

REVISED STATUTES OF THE UNITED STATES.

The following sections, among others, referred to, commented on, and explained: —

Sect. 691. See *Jurisdiction*, 4.

Sect. 692. See *Jurisdiction*, 1.

REVIVAL OF CONTRACTS. See *Life Insurance*, 1–5.

The doctrine of revival of contracts, suspended during the war, is based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive, — as where time is of the essence of the contract, or the parties cannot be made equal. *New York Life Ins. Co.* v. *Statham et al.*, 24.

"SANE OR INSANE." See *Life Insurance*, 6.

SAVANNAH RIVER. See *Commerce*, 1–4.

SCHOOL LANDS. See *Nevada*, 1–3.

In construing the act of March 3, 1853 (10 Stat. 246), the court held: 1. School sections 16 and 36, granted to the State of California by sect. 6 of the act, are also excepted from the operation of the pre-emption law to which, by the same section, the public lands generally are subjected. 2. The rule governing the right of pre-emption on school sections is provided by the seventh section of the act; and it protects a settlement, if the surveys, when made, ascertain its location to be on a school section. 3. In such case, the only right

SCHOOL LANDS (*continued*).

conferred on the State is to select other land in lieu of that so occupied. 4. The proviso to the sixth section, forbidding pre-emption on unsurveyed lands after one year from the passage of the act, is limited to the lands not excepted out of that section, and has no application to the school sections so excepted. *Sherman* v. *Buick*, 109.

SENTENCE. See *Jurisdiction*, 16.

SOUTH CAROLINA AND GEORGIA, COMPACT OF 1787 BETWEEN. See *Commerce*, 1.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, and explained: —

1797. March 3. See *United States, Right of, to Priority of Payment.*
1812. June 13. See *Land Grants*, 1.
1839. Feb. 28. See *Jurisdiction*, 10.
1850. Sept. 28. See *Patents for Lands*, 1.
1852. March 30. See *Commerce*, 8.
1853. March 3. See *Public Lands*, 4; *School Lands*, 1.
1864. March 21. See *Nevada*, 1, 2.
1864. June 30. See *Profits used in Construction, &c.*
1866. July 23. See *Public Lands*, 1.
1866. July 26. See *Nevada*, 3.
1867. March 2. See *Assignee in Bankruptcy*, 1; *Jurisdiction*, 6, 9, 12; *Removal of Causes.*
1868. July 20. See *Distilleries.*
1870. July 14. See *Import Duties.*
1872. June 1. See *Practice*, 17, 18.
1872. June 8. See *Contracts*, 2.
1874. June 23. See *Writs of Error*, 1.
1875. Feb. 16. See *Jurisdiction*, 4.

SUBROGATION. See *Bills of Exchange and Promissory Notes*, 2.

SUPERSEDEAS. See *Sureties in an Appeal Bond.*

1. Unless an appeal is perfected, or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of, it is not within the power of a justice of this court to allow a *supersedeas*. *Kitchen* v. *Randolph*, 86.
2. To make a *nunc pro tunc* order effectual for the purposes of a *supersedeas*, it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done. *Sage et al.* v. *Central R. R. Co. of Iowa et al.*, 412.

SURETIES IN AN APPEAL BOND.

1. Under the laws of Louisiana, sureties in an appeal bond, which operates as a *supersedeas*, are liable, by a summary proceeding, to judgment, after execution on the original judgment has been issued, and

SURETIES IN AN APPEAL BOND (*continued*).
a return of *nulla bona* made by the proper officer. *Smith et al.* v. *Gaines*, 341.
2. The officer who made this return cannot be compelled to amend or modify it, nor can its truth be questioned in the subsequent proceeding against the sureties. *Id.*
3. It is no defence that the defendant in the original judgment has been garnished, or the judgment sold, at the instance of creditors of the plaintiff, where the sureties have not been made parties to the proceedings to appropriate such judgment. *Id.*

SWAMP AND OVERFLOWED LANDS. See *Patents for Lands*, 1, 2.

TAXATION. See *Exemption from Taxation; Estoppel.*

TAXES. See *Lien for Taxes; Public Corporations*, 3, 4, 5; *Purchasers at Judicial Sales*, 1.

TAX-PAYERS, RESTITUTION TO, BY A STATE. See *Constitutional Law*, 2.

TORTS, MARINE. See *Commerce*, 6–9.

TOWN AUDITORS. See *Illinois, Town Auditors in.*

TRANSPORTATION OF GOVERNMENT TROOPS AND PROPERTY. See *Land-Grant Railroads*, 1, 2.

TREASURER'S DEED FOR LANDS SOLD FOR TAXES.
1. A treasurer's deed for lands sold for delinquent taxes in the State of Iowa, if substantially regular in form, is, under the statutes of that State, at least *prima facie* evidence that a sale was made; and, if there was a *bona fide* sale, in substance or in fact, the deed is conclusive evidence that it was made at the proper time and in the proper manner. *Callanan* v. *Hurley*, 387.
2. In a case where a tax-deed, regular in form, recited that the land was sold Jan. 4, and where the treasurer certified that the sales of land for delinquent taxes in the county began on that day, and were continued from day to day until Jan. 18, and that he entered all the sales as made on the 4th, it was *held*, that a sale of land at any time during the period from the 4th to the 18th was valid, and that recording such sale as made on the first day, though actually made later, did not impair the title. *Id.*

TREATY. See *Commerce*, 11, 12.

TRUSTEES. See *District of Columbia, Liability of the Trustees of Certain Corporations therein; Parties; Practice*, 13.

UNITED STATES CONVICTS.
1. Where a person, convicted of an offence against the United States, is sentenced to imprisonment for a term longer than one year, the

UNITED STATES CONVICTS (*continued*).

court may, in its discretion, direct his confinement in a State penitentiary. *Ex parte Karstendick*, 396.

2. Imprisonment at hard labor, when prescribed by statute as part of the punishment, must be included in the sentence of the person so convicted; but, where fine and imprisonment, or imprisonment alone, is required, the court is authorized, in its discretion, to order its sentence to be executed at a place where, as part of the discipline of the institution, such labor is exacted from the convicts. *Id.*

3. Where a court, in passing sentence of imprisonment in the penitentiary, finds that, in the district or territory where the court is holden, there is no penitentiary suitable for the confinement of convicts, or available therefor, such finding is conclusive, and cannot be reviewed here upon a petition for *habeas corpus*; and, where the Attorney-General has designated a penitentiary in another State or Territory, for the confinement of persons convicted by such court, it may order the execution of its sentence at the place so designated. *Id.*

4. It is no objection to the validity of the order, that the State has not given its consent to the use of its penitentiary as a place of confinement of a convicted offender against the laws of the United States. So long as the State suffers him to be detained by its officers in its penitentiary, he is rightfully in their custody, under a sentence lawfully passed. *Id.*

UNITED STATES, RIGHT OF, TO PRIORITY OF PAYMENT.

A party who obtains from a disbursing officer public moneys without right thereto, and with full knowledge that they are such, becomes indebted to the United States, within the meaning of the fifth section of the act of Congress of March 3, 1797 (1 Stat. 515), and, in the event of his insolvency, the United States is entitled to priority of payment out of his assets. *Bayne et al., Trustees*, v. *United States*, 642.

USURY.

1. Where a commission merchant, in Baltimore, advanced to a pork-packer, in Peoria, $100,000, for which he was to receive interest at the rate of ten per cent per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide on all the facts whether or not the commissions were a cover for usury, or were an honest contract for commission business, in connection with use of money. *Cockle et al.* v. *Flack et al.*, 344.

2. The express agreement of ten per cent is not usurious, because lawful in Illinois, though not so in Maryland. *Andrews* v. *Pond*, 13 Pet. 65, reaffirmed. *Id.*

UTAH TERRITORY, SUPREME COURT OF. See *Writs of Error.*

VENDOR AND VENDEE. See *Contracts*, 4, 5.

WAIVER. See *Equity*, 3; *Municipal Corporations*, 2, 3; *Pleading*, 4.

WAREHOUSE KEEPERS. See *Insurance*, 1–4.

WILL.

Where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life, and to do with as she sees proper before her death," the wife took a life-estate in the property, with only such power as a life-tenant can have, and her conveyance of the real property passed no greater interest. *Brant* v. *Virginia Coal and Iron Co. et al.*, 326.

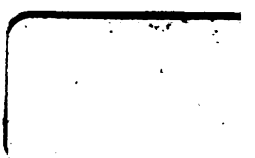
WINONA, CITY OF.

The contract between the city of Winona and the Minnesota Railway Construction Company, bearing date April 23, 1870, construed, and the rights of the respective parties thereto discussed. *City of Winona* v. *Cowdrey*, 612.

WISCONSIN, CODE OF. See *Constitutional Law*, 1.

STATUTE OF LIMITATIONS OF. See *Constitutional Law*, 1.

WRITS OF ERROR. See *Supersedeas*, 1.

1. A writ of error from this court to the Supreme Court of the Territory of Utah is allowed by sect. 3 of the act of Congress of June 23, 1874 (18 Stat. 254), in criminal cases, where the accused has been sentenced to capital punishment, or convicted of bigamy or polygamy *Wiggins* v. *People*, *&c.*, 465.
2. Writs of error from this court to the Supreme Court of the District of Columbia are governed by the same rules and regulations as are those to the circuit courts. *Stanton et al.* v. *Embrey, Administrator*, 548.
3. Judgments in the State courts against the United States cannot be brought here for re-examination upon a writ of error, except in cases where the same relief would be afforded to private parties. *United States* v. *Thompson et al.*, 586.

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